LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]

UNITED STATES, PETITIONER

vs.

ACME PROCESS EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 14, 1963
CERTIORARI GRANTED APRIL 22, 1963

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1116

UNITED STATES, PETITIONER

vs.

ACME PROCESS EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

	Original	Print
Record from the United States Court of Claims		
Opinion of the Commissioner	42	1
Excerpts from findings of fact	200	62
Recommendation for conclusion of law	225	77
Opinion of the Court, Davis, J.	226	78
Findings of fact	267	123
Conclusion of law	369	237
Proceedings after Court decision	370	237
Order denying motion for reconsideration	370	237
Clerk's certificate (omitted in printing)	371	237

	Original	Print
Orders extending time to file petition for certiorari	372	238
Order allowing certiorari	374	240
Plaintiff's Exhibit No. 1—Excerpts from Negotiated Contract DA-36-034-ORD-1213, dated January 27, 1953	375	241

[fol. 42]

IN THE UNITED STATES COURT OF CLAIMS

No. 349-57

ACME PROCESS EQUIPMENT CO., TO ITS OWN USE, AND FOR THE USE AND BENEFIT OF NICHOLSON PRODUCTS COMPANY, STEEL HEDDLE MANUFACTURING CO., FOLEY MACHINE COMPANY, PATTERN MACHINE & FOUNDRY CORPORATION, JAIMIE KOHAN, D/B/A MANALAPAN MACHINE & WELDING WORKS, AND THE PITTSBURGH NATIONAL BANK, SUCCESSOR TO THE PEOPLE'S FIRST NATIONAL BANK & TRUST COMPANY, ASSIGNEE OF ALL METALS INDUSTRIES, INC., v. THE UNITED STATES

OPINION AND FINDINGS OF FACT OF COMMISSIONER—
April 29, 1963

To the honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The following findings of fact, opinion and conclusion of law are submitted under the order of reference and the order of the court issued pursuant to Rule 45:

OPINION OF COMMISSIONER

When in July 1954 the Army Ordnance Corps canceled for suspected statutory violations the plaintiff's contract for 75 mm. rifles at the halfway mark, it set the stage for protracted litigation involving legal and factual issues of signal complexity. In broad outline, Acme's first experience as a defense contractor was to bid and win two negotiated Ordnance contracts awarded in early 1953, both of which soured into litigation. The one in suit was largely [fol. 43] subcontracted, leaving for Acme only the final finishing and assembly of components, and the earlier job of fashioning the rifle barrels from rough forgings with

machines furnished by the Government under a separate facilities contract. All Metals was the principal among several subcontractors. From the start and throughout Acme was beset by serious production delays due to a combination of causes, among them its own inexperience, defaults by subcontractors, and defects in some of the Government-furnished machines. Generous time extensions forgave many delinquent deliveries, but finally liquidated damages were assessed on others. In 1954 Ordnance uncovered alleged violations of statutes relating to kickbacks, contingent fees, and conflict of interest, and canceled the contract summarily in July. The facts of the purported violations involved a clique of unprincipled employees of Acme, teamed in larcenous liaison with a stockholding minor executive of Acme whose role will be told. Acme denies violations on technical grounds and rejoins that the charges of malfeasance were a smokescreen to enable the Government to cancel without cost a contract for the production of obsolete weapons no longer needed in order to avoid the heavy cost of termination for convenience. Cancellation left Acme financially crippled, for it was unreimbursed for much of its large investment in contract performance. Thereafter ensued years of fruitless but almost successful efforts by plaintiff to obtain settlement, stopped only by intransigence of the Army Ordnance Corps in opposition to advice from other agencies.

Among the Government's parade of defenses are claimed violations of certain statutes and covenants (Anti-Kickback Act, 10 U.S.C. 51; False Claims Act, 28 U.S.C. 2514, 31 U.S.C. 231; Conflict of Interest statutes, 18 U.S.C. 281, 284 and 5 U.S.C. 99; and the contract covenant against contingent fees), attribution of delays and excessive costs to incompetency of plaintiff and its subcontractors, liquidated damages for late deliveries, failure to exhaust administrative remedies, and lack of standing for subcontractors to sue. Should these defenses crumble and the plaintiff prevail, there is presented an interesting problem of damages on a "loss-type" contract canceled before completion. The plaintiff asks for restitution of *all* of its unreimbursed costs of performance

[fol. 44] under the debatable theory that where a contract is totally breached by wrongful cancellation prior to complete performance the injured party is entitled to be returned to his *status quo ante* by the restitution of his total expenditures less receipts. The plaintiff also urges its right to interest on amounts due on the basis of a taking having occurred. Subordinate to these problems lie still others.

For many years prior to the events with which we are concerned Acme enjoyed some prestige as a manufacturer of processing tanks, boilers, containers, etc., for the distillery, brewery and sugar industries, a predominantly civilian market. In 1952 it sought to enter the field of Government procurement in order to provide a cushion against the fluctuations of its commercial sales, particularly in periods of warborn material shortages. Lacking expertise in this prospective market, in the early fall of 1952 it engaged the services of a smooth and plausible team of adventurers, Harry K. Tucker, Jr., and James S. Norris, who represented themselves accurately to be experienced in Government procurement procedures, but concealed their dishonorable intentions to victimize their employer. With the understanding between themselves that Norris would share in emoluments paid Tucker by Acme, and with the prospect suggested by Norris and/or Tucker that Acme should establish under their management a separate division to handle Government contracts in the metals field, they went to work for Acme first under an informal arrangement providing a commission on sales with a minimum salary guarantee. Tucker entered into an express one-year contract with Acme on October 13, 1952, whereby he and/or his "organization" agreed to serve as a "bona fide sales agent" on a parttime basis and be paid at first a weekly minimum salary of $150 which, starting 45 days after the initial delivery date in contracts procured by him for Acme, would be increased to equal the sum of (1) 5 percent of weekly gross sales up to $10,000 generated by him and (2) 3 percent of weekly gross sales in excess of $10,000. Minimum salaries paid prior to any sales being made were to be deducted later from the excesses of his commissions over his minimum weekly guarantee. The net effect of the

arrangement was that the guaranteed weekly salary was an advance against commissions, and Acme could cancel [fol. 45] the contract if commissions failed to cover the minimum salary guarantee. The contract defined Tucker's services to include solicitation of invitations from both commercial firms and the Government. Tucker represented in the contract that he had no special connections of any kind with any Government departments. He agreed to assist in preparing price breakdowns and in planning of shop production methods, as well as in the collection of invoices, if requested, in obtaining contract financing, and in locating materials. The contract specifically provided that Tucker represented and would continue to represent other persons and firms having dissimilar [i.e., apparently meaning non-competing] lines of business. Norris and Tucker also entered into an agreement with each other that Tucker would pay Norris 50 percent of any moneys to be paid Tucker by his clients for procuring work for them from Acme. It is unlikely that Acme was aware of this latter agreement.

Tucker immediately impressed Acme with his capabilities which produced a deluge of inquiries, bid proposals and invitations from both commercial and Government sources. Among these were the invitation to bid on the contract in suit (hereafter "Contract 1213" for convenient reference) and invitations to bid on at least three other contracts for the Army Ordnance Corps, including the contract (hereafter "Contract 8580" for convenient reference) which was let and was being performed simultaneously with Contract 1213 and is the subject matter of another suit by Acme pending concurrently (*Acme Process Equipment Co., etc.*, v. *United States*, Ct. Cl. No. 538-59).

COVENANT AGAINST CONTINGENT FEES

The defendant contends that plaintiff forfeited its right to enforce the contract because it procured the contract through misrepresentation or concealment of Tucker's parttime employment, and because Tucker's employment violated the covenant against contingent fees.

In its original bid dated October 23, 1952, for Contract 1213 Acme, under the certification of James S. Norris as

General Manager of the Defense Work Department, did not fill in that part of the form requiring the contractor to represent whether it has or has not (boxes supplied [fol. 46] against each of the alternatives for inserting a mark to denote the correct fact) "employed or retained a company or person (other than a full time employee) to solicit or secure this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer." Under a revised proposal of December 10, 1952, also signed by Norris, it was represented that Acme "has * * * employed or retained a company or person (other than a full time employee), to solicit or secure this contract and agrees to furnish information relating thereto as requested by the Contracting Officer." At least this appears to have been the case according to the somewhat faint markings on a thermofax copy of the revised proposal in evidence as a Government's exhibit, and thus binding on the Government absent an adequate disclaimer. However, under date of December 18, 1952, Joshua Epstein, president of Acme, executed a Government form entitled "Contractor's Statement of Contingent or Other Fees", in which he either accidentally or deliberately filled in one of the two alternative boxes to indicate that Acme "has not employed or retained a company or person (other than a full-time employee) to solicit or secure this proposed Contract No.—and agrees to furnish information relating thereto as requested by the Contracting Officer."

Whether this last certification by Epstein was a simple inadvertency (for it was clearly wrong) or demonstrated an intent to deceive the Government is a question whose solution may find collateral aid in the contemporaneous representation which had been made by Acme to the Rock Island Arsenal of the Army Ordnance Corps in connection with three other invitations to bid, including that which ripened into Contract 8580. In its November 4, 1952 bid on Contract 8580 Acme correctly represented that it had employed a person other than a full-time employee to secure the contract, and furthermore, on or about December 12, 1952, not only filed a formal "Contractor's Statement of Contingent or Other Fees" under

the signature of Sidney M. Cohen, Secretary-Treasurer, which disclosed the other than full-time employment of Tucker, but also attached to the form a copy of Acme's employment contract with Tucker dated October 13, 1952. Cohen, five days later on October 18, 1952, certified the signature of Epstein to the misstatement contained in [fol. 47] the document referred to earlier in connection with Contract 1213.

It is thus seen that the only misrepresentation of fact with reference to Contract 1213 was that contained in Epstein's certification of December 18, 1952. All previous representations appeared in the original and revised bids under the signature of Norris, and in one of these instances he made what appears to be a correct disclosure while in the others he left the form blank and thus made no representations at all. Plaintiff's bid on Contract 1213 was made to the Philadelphia Ordnance District and its bid on Contract 8580 was made to the Rock Island Arsenal, so that there was no necessary disclosure by the latter to the former of the Tucker employment. But the plaintiff's candid disclosure to the Arsenal and clear misstatement to POD can be explained only in terms of inadvertency rather than deliberate concealment. It would have been witless indeed for Acme to believe it could successfully hoodwink the Army Ordnance Corps without eventual discovery, and the invisible benefits of such a subterfuge would not justify the drastic consequences of detection. Contract 8580 was awarded to Acme on January 8, 1953 by the Rock Island Arsenal but was administered by the Philadelphia Ordnance Depot (hereafter POD), so for some time prior to the award of Contract 1213 to plaintiff on January 27, 1953, POD had at least constructive knowledge of the Tucker employment contract which was physically incorporated in the Contract 8580 file, whether or not the knowledge was actual. In retrospect it is unlikely that full knowledge by POD of the Tucker employment contract would have prevented the award of Contract 1213 to plaintiff, for similar knowledge did not prevent the award of Contract 8580 to Acme by Rock Island Arsenal, and several months later, on June 23, 1953, POD issued a supplemental agree-

ment to Contract 1213 increasing the quantity by 429 rifles, although by then it had full knowledge of the Tucker employment contract and its substitution by a full-time agreement.

Before ending the discussion of this phase it should be observed that the "Contractor's Statement of Contingent or Other Fees", as a title for the Government form containing the certification whose execution by Epstein [fol. 48] caused the defense of misrepresentation to be raised, is itself inconsistent with the wording of the certificate. The certification declares merely that Acme has not hired an other-than-full-time employee to obtain the contract, etc., and represents nothing as to the fee basis of the employment. If the form was designed primarily to elicit facts as to contingent fee employments as the title would indicate, a certification restricted to disclosing data as to the existence of part-time salesmen would offer little help. To illustrate, it is conceivable that a contractor might engage a full-time salesman on a contingent fee basis to procure Government contracts yet his negative answer in the certification would legitimately conceal the very evil which supposedly the form was designed to expose. The need for revision of the form is apparent if it is to implement the contract covenant against contingent fees to any useful extent.

We now turn to the covenant against contingent fees included in the contract to determine the validity of the Government's charge that it was violated by Tucker's employment. The covenant reads in pertinent part as follows:

> The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business * * *.

Under conditions identical in all save one respect this commissioner's opinion in Acme's companion case alluded

to earlier as pending before the court, concluded that no violation of the contingent fee covenant occurred, and the result and reasons given there are adopted here by reference. The only difference between the facts of the two cases on the matter under consideration is that in the instant case the plaintiff had stated in its bid that it had not employed a parttime sales representative to secure the contract, an inadvertency which has been exhaustively analyzed already. The misstatement had no more effect in inducing the award of the contract than a full disclosure of the allegedly concealed fact would have had in preventing an award. The Government not only awarded the [fol. 49] contract after it had constructive knowledge of the Tucker employment contract, and failed to disavow it after it had express knowledge, but also acquiesced in its previous failure to disavow by increasing the quantities under the contract. Evidently the defendant took no such action because at the time the plaintiff's oversight was not considered to be important. If the plaintiff's employment of Tucker was *bona fide* so as to come within the exception of the covenant against contingent fees as has been found with respect to Acme's companion suit on Contract 8580, it cannot be seen how the plaintiff's temporary lapse in not disclosing the hiring of Tucker in connection with the bid on the instant contract can possibly affect the *bona fides* of the employment relationship, even though such disclosure is listed as one of the criteria of a *bona fide* employment in the applicable regulations (32 C.F.R. 1.505-1, *et seq.*, 18 F.R. 198-90).

A contingent fee employment contract may alert suspicions or excite inquiry, but its mere passive existence without the catalystic company of ulterior facts in nothing more than a commonplace yardstick for compensation. Concealment of such arrangements heightens the apprehension with which they should justly be regarded, but still does not foreclose their innocence or prove their guilt in the absence of other factors implicating them in a design to expose Government servants to corruption in the discharge of their duties. Had Acme performed its contract satisfactorily and had Tucker not been unfaithful to his employer in a manner to be related, it cannot

be supposed that the Government could avoid its obligations under the contract solely because Tucker's compensation was briefly fixed as a proportion of his sales. The combination of circumstances which led the Government to resort to the drastic action of cancellation did not result from the contingent fee nature of Tucker's employment but, instead, would most certainly have transpired even had Tucker been employed on a basis meeting with all requirements. There is no hint or charge that Tucker possessed or endeavored to exercise any undue influence in securing contracts for the plaintiff.

It may be superfluous to pay brief respects to the plaintiff's added point that, by failing to formally plead a breach of the covenant against contingent fees until al- [fol. 50] most four years after the filing of the petition, the defendant forfeited its rights to rely on it. The original cancellation of the contract in 1954 was for unspecified "statutory violations". The precise reasons for cancellation remained formally unspecified until the filing on March 8, 1961 of the defendant's Answer, Counterclaims, Affirmative Defenses and Special Plea in Fraud in response to the plaintiff's Third Amended Petition. It is reasonably accurate to say that the violation of the covenant against contingent fees and the statute from which it was derived (10 U.S.C. 2306(b)) was one of the "statutory violations" of less importance in the minds of the Army Ordance Corps when it canceled the contract for unspecified "statutory violations". Nevertheless it was present among a collection of grievances, although later the Comptroller General shook the Army's faith in its position when in March 1956 he advised that "it is questionable whether there was any breach of the contingent-fee covenants in the contracts of that company" because he thought Tucker "might have qualified as a full-time employee". In May 1957 the Comptroller General reversed himself and advised the Army that, on the basis of additional information leading him to believe that Tucker was actually a parttime employee, the plaintiff had violated the covenant against contingent fees. Thus the defendant was fully aware over a period of

many years that violation of the covenant against contingent fees was at least one of its defenses. In its original answer filed on February 17, 1958 to the petition in this case the defendant included a special plea in fraud, without specifying to an extent sufficient to apprise the plaintiff of the grounds. The plaintiff says that the defense of a contingent fee violation was a belated afterthought put forth tardily to bolster other purported grounds for violation, and that the Government, having repudiated the contract on one ground, cannot defend on some other ground not advanced at the time of cancellation, citing *David J. Joseph Co.* v. *United States*, 113 Ct. Cl. 3, 82 F. Supp. 345 (1949), and *Companhia Atlantica, etc.*, v. *United States*, 148 Ct. Cl. 71, 180 F. Supp. 342 (1960). The problem under consideration is not the same as those in the cited cases, in that here the violation of contingent fees was one of several "statutory violations" ambiguously announced by the Government as its reason at the [fol. 51] time of cancellation, and not a defense hurriedly salvaged several years later to strengthen other grounds. This is not to condone the Government in not being more candid at the time. When it cancels a contract the Government is under an obligation to specify the reasons and the contractor is entitled to know them. If the defendant continues to cloud its affirmative defenses in ambiguity after suit is filed, then of course the plaintiff has recourse to the rules of court to compel a clarification. However, were it not for the conclusion announced above that the plaintiff did not violate the covenant against contingent fees, the *Companhia Atlantica* case, *supra*, would be a singularly cogent precedent for holding that by not disavowing the contract when it first learned of the Tucker employment contract and by permitting the plaintiff to continue in its performance thereafter, the Government waived its right to urge the breach of covenant as a defense to an action on the contract for cancellation.

ANTI-KICKBACK ACT

One of the Government's primary defenses to this action and its principal reason for initial cancellation of the contract in suit is the alleged violation of the Anti-

Kickback Act (10 U.S.C. 51), which occurred within the framework of the following events:

The employment by Acme of Tucker and Norris has already been described. Acme can be accused of carelessness in failing to make an adequate investigation of the background of these men who were to be entrusted with undertakings of considerable importance to the company, but it is clear beyond doubt that they were not engaged to obtain any specific contracts for the plaintiff or because they had, or represented themselves to have, particular influence with Government procurement officials which could be exercised on Acme's behalf in securing contracts. Nor is there any suggestion in subsequent developments that Tucker and Norris had or endeavored to exercise any such influence. Rather it is proven that Tucker and Norris convinced Acme only that they were experienced in Government procurement procedures, and apparently they were. If their chief defect proved to be their dishonesty, it was employed to victimize Acme and its sub- [fol. 52] contractors, and not in this instance with any intention to cheat the Government. This is not to say that they would necessarily have had any compunction against cheating the Government given the chance, but only that in the ordinary course of events a contract of the type in suit (i.e., fixed target price with a slightly higher ceiling price if circumstances warranted it) offered little or no opportunity for the Government to bear the brunt of the kickbacks which Tucker and Norris extracted from Acme's subcontractors.

The means adopted by Tucker and Norris to fleece Acme were simple. Various small manufacturers in the metals field had service contracts with Tucker similar to that which Tucker had with Acme, under which they agreed to pay Tucker commissions for obtaining contracts, usually with a minimum weekly guarantee. The conspirators concealed from Acme the existence of these fee contracts when Acme, through Tucker and Norris, let subcontracts to Tucker's secret clients, so that each subcontract price necessarily contained an amount to cover the fee paid to Tucker and shared by Norris. Since Norris and Tucker were given virtually full responsibility for promoting

Acme's new venture into Government contracts and had authority to let subcontracts under prime contracts Acme would obtain through their services, it was no problem for them to favor their own clients in the award of subcontracts, and thus insure a steady flow of commissions. Coupled with the fact that Tucker and Norris not only obtained invitations on contracts with the Government for Acme but also prepared Acme's bids and negotiated all the subcontracts, it is apparent that they were in a splendid position to mulct their employer. It is strange that the responsible officials of Acme could have been so naive, but hindsight usually offers attractive advantages.

The subcontract let to All Metals is the most flagrant example of the Tucker-Norris extortion scheme. All Metals was organized in 1951 as a small machine shop. It entered into a written agreement on October 1, 1952 to pay Tucker 5 percent of weekly gross sales up to $10,000 for business procured by Tucker, plus 3 percent above $10,000, with a minimum guaranteed weekly salary of $100 to be charged against commissions. Tucker prom- [fol. 53] ised to obtain subcontracts for All Metals under Acme's Contracts 8580 and 1213, and did so subsequent to the award of the prime contracts to Acme. On January 27, 1953, Contract 1213 was awarded to Acme for 75 mm. rifles, and on February 2, 1953, Acme issued a purchase order to All Metals for the production of vent assemblies at specified target and ceiling prices. At this time the All Metals' officials who dealt with Tucker knew that he was acting simultaneously as agent for Acme. Except for certain of Acme's employees whose roles as members of the Tucker-Norris conspiracy will be explained, the responsible officials of Acme did not realize that Tucker was also agent for All Metals. By force of specific provision in the Anti-Kickback Act it is conclusively presumed that All Metals' subcontract price included the sales commission due Tucker under his contract of employment. All Metals ultimately paid Tucker $2,200 pursuant to the contract.

Jack Epstein was at this time the son of Joshua Epstein, president of Acme, and was serving as superintendent of Acme's home plant. He also owned non-voting

stock in Acme. On or about February 17, 1953, Jack Epstein and Tucker advised the officials of All Metals that its subcontract would be canceled unless it paid Jack Epstein $25,000 in cash. Jack Epstein falsely represented himself to be vice president of Acme. Oppenheimer of All Metals believed this fiction and erroneously assumed that Jack Epstein had the authority to cancel the subcontract. He assumed further that this was an "income tax dodge" of some kind and, because he knew that Jack Epstein was the son of Joshua Epstein, Acme's president, he concluded erroneously that Joshua Epstein was implicated. On Oppenheimer's protest that All Metals was financially unable to meet the demand for $25,000 in cash, Tucker and Jack Epstein suggested as an alternative that All Metals should let a contract for $23,500 to Gunn Engineering Company for "engineering services" while Acme's subcontract to All Metals would be increased commensurately. This alternative proposition had been cleared with Norris beforehand by Tucker and Jack Epstein. Gunn Engineering Company was a dummy corporation which had been organized about this time and was owned by Tucker, Norris and Jack Epstein. Acme's responsible officials (and this term excludes the conspirators) were [fol. 54] not fully aware of the existence of Gunn Engineering Company until the cancellation of Acme's contract the following year.

All Metals accepted the alternative proposal under economic duress, and on February 18, 1953, issued a purchase order to Gunn Engineering Company for "Consulting Engineering Services and Tool Design as per Verbal Agreement" for a price not to exceed $23,500 payable in installments. Coincidentally, Acme issued a revised purchase order to All Metals which superseded the original purchase order of February 2 and increased the vent assembly price by $10 per unit to cover the amount extorted from All Metals as related above. Through May 5, 1953, a total of $12,000 was paid by All Metals to Gunn Engineering Company. Needless to say, the latter rendered no services whatsoever.

During the spring of 1953 the consipirators became fearful of exposure. They knew Norris was under official

investigation and wished to cover up their tracks as best they could to erase proof of the illegal transaction involving Gunn Engineering Company, as well as Tucker's agency relationship to All Metals during the shakedown period. To do this they sought and secured the cooperation of the All Metals officials. By a series of documents and bookkeeping entries accomplished in June 1953 but backdated, Tucker's employment contract with All Metals was terminated ostensibly as of February 10, 1953, All Metals' purchase order to Gunn Engineering Company was retroactively canceled, and Acme's revised purchase order of February 18, 1953 to All Metals was amended by reducing the unit price of vent assemblies by $11.50, thus bringing it to $1.50 per unit less than the price in the first purchase order of February 2, 1953. All Metals issued a credit to Acme for the overcharge on the only four vent assemblies which All Metals had by that time delivered. Acme paid the correct invoice for delivered vent assemblies in August 1953 so had at no time actually paid All Metals for units billed at the inflated price. The details of these transactions are described in finding 21. Through an oversight in All Metals' books the technical effect of these urgent efforts to escape detection was to leave in the cost structure of All Metals' ultimate subcontract price to Acme the $12,000 already paid to Gunn Engineering Company, although this sum was more than [fol. 55] offset by the waiver by Tucker of commissions due him by All Metals. The Government concedes that the ultimate All Metals' subcontract price after the corrections were effected was less than the original subcontract price, but maintains that the final price to Acme involved in the claim presented to the Government for payment included a kickback element in violation of the statute. If Gunn Engineering Company and the Tucker-Norris combination be considered as synonymous, as indeed they were for the purpose of extorting moneys from All Metals, it becomes clear that even after All Metals reduced its ultimate price to less than that in the original purchase order, the price so reduced still contained some portion of the combined fees which All

Metals had paid or agreed to pay to Tucker and Gunn Engineering Company. Bookkeeping technicalities tend to obscure this fact, but in the final analysis, had Contract 1213 been of a cost reimbursable nature the Government would ultimately have borne part of the cost of the kickbacks in the absence of complications.

The same question in a less aggravated form exists with reference to the arrangements between Tucker and other firms for whom he obtained subcontracts from Acme under the contract in suit. These facts are recited in findings 22 through 25. Manalapan hired Tucker in November 1952 on a commission basis including a minimum salary guarantee to procure business, and as a result obtained a series of small purchase orders from Acme under Contract 1213 from February 1953 through July 1953. The prices in the purchase orders included latently the $1,350 in commission and/or salaries which Manalapan paid Tucker and which Tucker shared with Norris. Manalapan knew or should have known that Tucker was Acme's agent, but the responsible officials of Acme (excluding again the conspirators) were not aware of the double agency. Pursuant to comparable arrangements the Foley Machine Company secured a subcontract from Acme through Tucker and paid Tucker (or rather, a spurious alter ego, the Neptune Manufacturing Company, Inc.) weekly drawing accounts totaling $150 against commissions. However, on February 27, 1953, Tucker canceled the services contract between Neptune and Foley and returned the uncashed checks to Foley. Foley knew or should have known that Tucker was Acme's agent, but [fol. 56] Acme was ignorant of the double agency. Foley's subcontract price included latently the commissions which it expected to pay Neptune. This pattern with minor variations was repeated with respect to Nicholson Products Company which obtained subcontracts from Acme through Tucker, Sr., and paid him commissions pursuant to an employment contract concealed to Acme. Tucker, Sr., was the father of Tucker, Jr., and himself had a reputation in Government procurement circles for "5 percent" activities which he operated jointly with his son. However, Tucker, Sr., was not an employee of Acme

and, although there is a natural suspicion that father and son shared the spoils, the suspicion falls short of proof and, therefore, no violation can be seen. Finding 25 presents a further variation as to a subcontract awarded the firm of Johnson & Kunz. Norris hired one Philip Chagnon as his assistant on the Acme payroll as an expediter performing largely clerical duties. Chagnon was aware of the Tucker-Norris-Epstein conspiracy to cheat the unsuspecting plaintiff and, fired with the same spirit of enterprise, entered into a clandestine commission agreement with Johnson & Kunz to secure it contracts. Chagnon got Norris to award a subcontract to Johnson & Kunz under Acme's Contract 1213, and Chagnon, using a pseudonym, was paid $900, knowledge of which he carefully kept from his fellow-conspirators. This was Chagnon's private graft, and of course the commission he received was latently included in the subcontract price.

Norris was discharged by Acme in September 1953 for improper conduct precipitating an investigation by the Federal Bureau of Investigation, and for unauthorized personal expenditures which he had charged against Contract 1213. He was replaced by Jack Epstein as superintendent of plaintiff's Lansdale plant which had been organized as plaintiff's Defense Work Department to perform defense contracts. Jack Epstein in November 1953 executed a false affidavit that at no time had he received any commission from any Acme subcontractor in connection with Government contracts. In August 1954 he resigned from Acme. Reading between the lines it is reasonable to conclude that Jack Epstein's involvement in the Tucker-Norris conspiracy was known to at least some extent by the Acme officials in 1953, and that his [fol. 57] retention by the firm for a year longer was attributable to the fact that his father was Acme's president. One can imagine the paternal dismay at such a betrayal. Tucker was dismissed in November 1953 for reasons not specified in the record. Chagnon left Acme's employ in November 1953.

Tucker, Norris and Jack Epstein were indicted for violation of the Anti-Kickback Law, and in April 1956, after presentation of the Government's case, the defense motion for acquittal was granted on the technical ground

that the statute did not apply to the type of contract in suit. The court made scathing comments as to the conduct of the defendants, observed that Acme had been victimized, and recommended the need for legislation amending the statute so that it would apply to such situations.

From the facts as presented the Government contends that plaintiff violated the Anti-Kickback Act (10 U.S.C. 51), and that it forfeited any rights under the contract on the grounds of public policy. The Anti-Kickback Act was originally enacted on March 8, 1946 at the recommendation of the Comptroller General. Its purpose as recited in the relevant committee reports (House Report No. 212 and Senate Report No. 177, 79th Congress) was as follows:

> The purpose of the bill is to eliminate the practice of subcontractors of paying fees or kickbacks, or of granting gifts or gratuities, to employees of cost-plus-a-fixed-fee or cost-reimbursable prime contractors, or of higher tier subcontractors, for the purpose of securing the award of subcontracts or orders. * * *.

The reports further gave the reason for the Government's interest in the following words:

> * * * Since cost-plus-a-fixed-fee or cost reimbursable prime contractors are reimbursed by the United States for the cost of all subcontracts and purchase orders performed thereunder, the Government undoubtedly bears the ultimate cost of such fees, commissions, and gratuities without receiving any benefit therefrom.

The relevant language of Section 1 of the original Act is as follows:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or [fol. 58] gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department,

agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, *on a cost-plus-a-fixed-fee or other cost reimbursable basis;* or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgement of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, *whether heretofore or hereafter paid or incurred* by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or cost reimbursable contract, or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, *it shall be consclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States,* * * *. [Emphasis added.]

Section 4 of the Act provides criminal penalties, viz:

> Any person who shall knowingly, directly, or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

It will be observed from the italicized portions of the statute that (1) it applied only to cost-plus-a-fixed-fee or other cost reimbursable types of contracts, (2) it had [fol. 59] retrospective application, and (3) it created a conclusive presumption that the cost of kickbacks was included in subcontracts to which they pertained and was ultimately borne by the Government.

On April 13, 1956, the United States District Court for the Eastern District of Pennsylvania acquitted the defendants in Criminal Case No. 18535 entitled *United States* v. *Norris, Tucker and Epstein.* They had been charged with violation of Section 4 of the Anti-Kickback Act (41 U.S.C. 54, *supra*). In its unreported opinion the court held that "The scheme was despicable and morally reprehensible, but unfortunately within the narrow letter of the law.", because the statute "does not cover the contract in this case." The court then directed that its remarks be furnished the Attorney General of the United States so that "Congress may if it so desires amend this Act to include as a crime the vicious and immoral type of conduct that has been exhibited in this case." It is obvious that the court felt that a negotiated fixed-price contract with a price redetermination provision permitting a retrospective or prospective increase within a narrow range to a ceiling price was not a cost-reimbursable type of contract to which the Anti-Kickback Act applied.

The Comptroller General promptly recommended that Congress amend the Act. By the Act of September 2, 1960, an amendment was adopted which, for our purposes, broadened the coverage of the statute to include all negotiated contracts, which it defined to mean all contracts made without formal advertising. No change was made in other essential respects.

A threshold contention presented by plaintiff is that the payments made by the subcontractors to Tucker did not violate the Anti-Kickback Act because they were made to him as a *bona fide* sales representative. There is nothing in the record to indicate that Tucker obtained for the subcontractors any subcontracts other than those issued by Acme. It would therefore appear that whatever the subcontractors paid Tucker was in reality paid for the sole purpose of procuring subcontracts from Acme, and

nothing else, even though the terms of his hiring were in more general language and pertained to any work which he might procure for them.

[fol. 60] Also of a minor nature is the plaintiff's argument that All Metals' proposed payment to Gunn Engineering Company was for the purpose of *retaining* a subcontract already awarded, and not for the purpose of *obtaining* a subcontract as the language of the statute reads. The argument is too transparent to require more discussion than to remark that in effect the extortionate proposal of the Tucker group was to obtain a subcontract for All Metals at a higher price, and the threatened cancellation of the original purchase order was merely a coercive technique to compel All Metals' acquiescence. Even in the absence of the Gunn Engineering Company extortion, All Metals' original subcontract price included an element of kickback in the form of the fees to be paid Tucker under the terms of his existing employment contract with All Metals.

The plaintiff next contends that the acquittal of the conspirators in the criminal case operates to collaterally estop the Government from reliance on the defense that violation of the Anti-Kickback Act destroys the plaintiff's right to enforce the contract, on the theory that a Federal court has already adjudicated the issue of its inapplicability. The District Court only decided that the basic 1946 version of the Anti-Kickback Act did not apply to the type of contract involved in this proceeding. It decided nothing with reference to the Act as it was amended in 1960 because the acquittal preceded the amendment and was directly responsible for its enactment by Congress. Only if the 1960 amendment cannot be applied retrospectively could collateral estoppel even be considered.

The plaintiff strenously maintains that retrospective application of the 1960 amendment to the Act violates the constitutional prohibition against *ex post facto* laws. The 1946 Act provided that kickbacks, "whether heretofore or hereafter paid or incurred", shall not be charged as a part of the contract or subcontract price. This remained unchanged by the 1960 amendment. The very issue was presented in *United States* v. *Davio*, 136 F. Supp. 423

(1955), where, in an action by the Government against subcontractors to recover amounts paid prior to 1946 as kickbacks to obtain subcontracts, the court held that the words of the Anti-Kickback Act "unequivocally evi-
[fol. 61] ate retrospectively," and further, "The Constitutional prohibition against the enactment of *ex post facto* laws has been primarily limited to criminal or penal statutes. Section 1 of the Anti-Kickback Act * * * is civil in nature and is not offensive to the Constitution." There is no reason to disagree with the *Davio* opinion in the context of its particular facts. *Calder* v. *Bull*, 3 Dall. 386, 390, held that the *ex post facto* provision of Article 1, § 9, clause 3 of the Constitution applies only to criminal and penal legislation. Statutes providing a retrospective operation are to be strictly construed (Vol. II, Sutherland Statutory Construction, 2d ed. § 647). If the retrospective application of the Anti-Kickback law in the instant case were to result in a forfeiture by Acme of its entire action, it may well be that the severity of the penalty would justify close scrutiny of the Act to determine whether it might not violate the spirit of the *ex post facto* prohibition in the Constitution. But Section 1 of the Anti-Kickback Act limits the civil damages for its violation to recovery of the kickback, and does not sanction a forfeiture of all amounts otherwise due, a result which defendant nevertheless urges on general principles of public policy. If the court is to implement the intent of Congress as expressed in the Anti-Kickback Act, it would be in gross excess of that intent to decree a forfeiture unless the action of the plaintiff is so disruptive of public policy as to justify the invocation of the most drastic civil penalty known to common law. But we are not endeavoring to apply principles of common law in this case, for if the offense in question was such at common law as to warrant a forfeiture, in legislating a penalty for kickbacks the Congress has preempted the field of civil punishment for that brand of offense.

This is unlike the situation in *Mississippi Valley Generating Company* v. *United States*, 364 U.S. 520, on the philosophy but not the facts of which defendant places great reliance. There the dual agent was held to have

so violated the spirit of section 434 of title 18, United States Code, "one of several penal conflict-of-interest statutes which were designed to prohibit government officials from engaging in conduct that might be inimical to the best interest of the general public", that the breach of public policy expressed in that act made the contract unenforceable. Congress has not provided civil punish-
[fol. 62] ment in that class of cases, thereby leaving the courts free to impose whatever civil consequences the individual contract case deserves. This is not so in the Anti-Kickback Act in which Congress has imposed civil as well as criminal penalties, and in prescribing the former has clearly expressed its intent as to the proper measure of punishment. Moreover, a more basic distinction exists between the *Mississippi Valley Generating Company* case and the present one. There the dual agent offered the public policy derived from a statute *in esse*, while here the public policy prohibiting kickbacks in contracts such as the one in suit was not expressed until over six years after the events. Acme not only was ignorant of Tucker's ambivalence, but also could not foresee that Congress would amend the Act to apply retrospectively to the specific type of contract in suit, a type which rational judgment would hold, and the district court did so hold in *United States* v. *Norris, et al., supra*, not to be covered by the then contemporaneous version of the Act. It may be necessary to validate the retrospective feature of the 1960 amendment to the Act, but the *Mississippi Valley Generating Company* holding does not dictate the retrospective consequence of forfeiture for conduct whose offensive nature was not appreciated by plaintiff at relevant times. Before forfeiture of rights can be decreed for violation of public policy the public policy must have tangible existence in clear and unmistakable terms, the conduct must clearly violate those terms, and the offender must be actually or ostensibly aware of the violation so as to supply the factor of intent. It was said in *Muschany* v. *United States*, 324 U.S. 49, 66, 67:

> * * * Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. *Vidal*

v. *Philadelphia*, 2 How. 127, 197-98. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353; *Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38. It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of
[fol. 63] obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy. The courts must be content to await legislative action.

The purpose of the Anti-Kickback Act is to insure morality in one phrase of procurement of public contracts. The action of the subcontractors in paying illicit tribute to Tucker and his associates to obtain work from Acme, knowing as they did of the double agency and with Acme as the marked victim of the duplicity, deserves scarcely less censure than is due the conspirators themselves. Such conduct in private contracting, if it exists, is to be severely condemned; in public procurement it cannot be tolerated. Acme was negligent in allowing itself to be vulnerable to such knavery as has been witnessed here, but its role as intended victim of the plot precludes the possibility that its responsible officials were privy to it. Nor are they tarred by imputation of their guilty agents acting beyond the scope of their employment, for the case comes within a well-established exception to the general rule which excludes its application where the principal is defrauded by his agent. (2 Am. Jur. Agency, § 379; Fletcher, Private Corporations, Vol. 3, § 826 (perm. ed. rev. 1947)). No doubt All Metals had no voluntary or conscious intention at the time it hired Tucker, or when later it was blackmailed into acquiescence to the Gunn Engineering Company scheme, to cheat the Government or even Acme. Its sole concern was to promote and protect its own inter-

ests, and its complete disregard of ethical considerations was shocking. Logically the culpable subcontractors deserve greater civil punishment than the careless but innocent plaintiff. Yet under the law of the case forfeiture of the subcontractors' claims is no more available than it is as to the plaintiff, because sufficient sanction for so drastic a penalty is absent. They have walked the narrow but visible line between the *Davio* and *Mississippi Valley Generating Company* precedents. As far as the kickback violation is concerned the subcontractors lose their right to recover the kickbacks as a cost of performance; while Acme paid or incurred no kickbacks, is claiming none for itself, and can therefore be charged with none.

[fol. 64] FALSE CLAIMS ACT

The defendant contends that the plaintiff committed fraud in the presentation of certain claims for payment both before and after cancellation of the contract, and is therefore subject to forfeiture under 28 U.S.C. 2514 and to fine under 31 U.S.C. 231, which latter is asked by counterclaim.

The first alleged violation pertains to those cost figures submitted by plaintiff to the Government on April 29, 1954 in support of plaintiff's request for allowance of the contract ceiling price (finding 52). The plaintiff included in its statement of costs certain costs which, while actually expended, are said by defendant not to have been properly chargeable to the contract in suit. These were: subcontractors' costs which included without specification commissions which they had paid to the Tucker group; the $12,000 inflation in All Metals' costs involving the contract ransom paid to Gunn Engineering Company; payments of salaries and/or commissions by plaintiff to Tucker; $1,045.52 charged by Norris against the contract for personal services rendered by plaintiff's contract employees on Norris' farm, the facts or which had been fully conveyed by plaintiff to the Government in December 1953; $470 plus hotel expenses paid by plaintiff to Mr. Lee, an employee of the Government's Watervliet Arsenal for his services as will be related; and minor

hotel, meal and entertainment charges for Government employees.

By the time these costs were submitted for price redetermination the Government was aware of the circumstances surrounding them. The costs were actual and not fictitious. There was no concealment by plaintiff, but rather a difference of opinion as to whether such expenditures were classifiable as proper charges. Plaintiff's accountant advised the Government immediately prior to contract cancellation why he could not certify the costs which he had previously prepared for submission, explained why he had not corrected certain small errors in the submission, and observed that the elimination of the questionable items would still leave plaintiff with costs greatly in excess of the contract ceiling price. The defendant's Board of Awards approved the increase to the contract ceiling price on the basis of revised data, but [fol. 65] final action was not taken because the contract had been canceled in the meantime.

During the pendency of this suit the parties made settlement overtures, and for settlement purposes the plaintiff submitted the fiscal aspects of its claim to the Attorney General in August 1958 on a standard termination form entitled "Settlement Proposal (Total Cost Basis)", certifying in part that "they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United States * * *". The claim was audited by the defendant and plaintiff objected to certain charges and disallowances made by the audit. In its termination settlement proposal plaintiff had included all but $5,561.31 of those direct charges in its earlier price redetermination cost submission which defendant says were false claims. The items totaling $5,561.31 so removed from the termination settlement proposal as direct charges against the contract were reclassified in the said proposal as General and Administrative expense, thus resulting in a portion of them being allocated to the performance of the contract. The expenses so reclassified and allocated included expenses of entertaining visitors from Watervliet Arsenal, payments to Lee of Watervliet

Arsenal for special services as mentioned before, part of a Government employee's hotel bill, and the salaries and/or commissions paid to Tucker. Here again the submission of these disputed claims was not intended to deceive nor did it deceive the Government, which had by then complete knowledge of the circumstances.

With some modifications the same cost items were submitted again by plaintiff to the defendant in June 1961 in response to the issuance of an order by the court under Rule 28. This last submission, which dealt separately with the plaintiff's claims and those of its subcontractors, was accompanied by a letter from plaintiff which said that it had not audited the subcontractors' claims but believed them not to be overstated, and invited the Government to confer with plaintiff as to any items in the claim which were not accurate or properly includable. The Rule 28 damage schedule eliminated certain items which had been objected to in the termination settlement proposal (payments to Lee, expenses in connection with Norris' farm, certain travel expenses of Tucker, a few enter-
[fol. 66] tainment expenses) but retained in a General and Administrative expense category certain other costs as they were in the settlement proposal for proportionate allocation to the contract in suit (Tucker's salaries and/or commissions paid by plaintiff and the subcontractors).

The defendant has not only asked that the plaintiff's entire claim be forfeited under the False Claims Act (28 U.S.C. 2514), but has also filed a counterclaim under 31 U.S.C. 231 seeking an affirmative judgment totaling $6,000 for plaintiff's misrepresentations in the price redetermination proceedings, termination settlement proposal, and schedule submitted pursuant to Rule 28. The defendant has also requested that findings be made that the subcontractors All Metals and Manalapan practiced fraud against the Government in the presentation of their claims by including in their statements of cost items not contributing to subcontract performance (i.e., fees paid to Tucker and/or Gunn Engineering Company) and thus inflating plaintiff's claimed costs. The factual predicate for forfeiture under 28 U.S.C. 2514 or fine under

31 U.S.C. 231 differs in expression but not in kind, so that the circumstances constituting violation of the former would support an offense under the latter, although the greater severity of forfeiture as a consequence might give rise to a natural requirement of correspondingly more stringent proof of a 28 U.S.C. 2514 violation.

The foregoing facts do not amount to fraud, without which element the mere presentation of a claim against the United States containing errors or mistakes in judgment does not offend 28 U.S.C. 2514 or 31 U.S.C. 231. They do not constitute fraud primarily because at each stage of their submission the defendant was aware of the facts concerning the separate items and there was no intent by the plaintiff to deceive by subterfuge, invention or prevarication. The plaintiff had actually expended the sums and, in some cases more than others, the propriety of charging them as contract costs, either directly or indirectly by allocation through an overhead account, was a question of accounting judgment. On the occasion of each submission the plaintiff conceded the possibility of errors, and actually or impliedly offered to discuss their correction or revision. A further reason exonerates the price determination application from the charge. The [fol. 67] total of the plaintiff's costs exclusive of those whose propriety is challenged by the defendant so overwhelmingly exceeded the contract ceiling price for which the application was designed to obtain approval, that justification for approval was more than ample without padding plaintiff's costs with the questioned items. This circumstance alone negates any intent to defraud. The claimed cost items of salaries paid to Tucker by plaintiff and its subcontractors, and the $12,000 paid to Gunn Engineering Company by All Metals, were actually paid, and at the time it is conceivable that plaintiff legitimately thought that they were proper charges against the contract, for it was believed then that the Anti-Kickback Act did not prohibit kickbacks in a fixed-price contract, and the retention in the All Metals' subcontract price of an amount to cover either the extortion or the amounts thought to be due Tucker would not necessarily have led to the conclusion that anyone other than Acme was the

victim. The reassertion of certain of the cost items in the termination settlement proposal may have again displayed poor judgment, but the full knowledge which then existed on the part of the Government precludes any possibility that the plaintiff was endeavoring to deceive. The same can be said as to the plaintiff's final submission of its costs in its schedule filed for audit pursuant to the issuance of an order under Rule 28, in which schedule certain of the questioned items had been omitted entirely and others had been reclassified so that only a portion would be allocated as a charge to the contract in suit. There is hardly a contract dispute in the experience of the writer where the Government has not found some measure of disagreement with the cost items submitted by a plaintiff in its schedule of damages. It is not abnormal for plaintiffs to maximize their claims by resolving doubts as to particular items to their own advantage, fully expecting a challenge by the Government auditors. This is not to condone or sanction deliberate misstatements or fictions, but merely to recognize realities and avoid the absurd results which would flow if accusations of fraud were leveled at every difference of opinion among accountants.

In *S. Harvey Klein* v. *United States*, 285 F. 2d 778 (Ct. Cl. 1961), the court refused to forfeit the plaintiff's [fol. 68] claim where in several instances the plaintiff not only collected progress payments from the Government for subcontracted work which had been incurred but not paid for, but also had fictitiously doubled one subcontract price so as to obtain larger progress payments than it had earned. In *Klein*, which involved a fixed-price contract and so could not ultimately have increased costs to the Government, the court, relying on the universal rule that "evidence of fraud must be clear and convincing", found no intent to defraud sufficient to justify a forfeiture, but instead charged the plaintiff interest on the sums which plaintiff's actions had caused the Government to pay before they were due.

Wagner Iron Works v. *United States*, 146 Ct. Cl. 334, does not persuade a different result. That case involved a flagrant instance of padding a termintion-for-conven-

ience claim with an allocated portion of personal expenditures of the two sole owners and officers of the corporation, and the preparation of "fictitious vouchers for the purpose and intent of concealing such charges from detection in any normal audit procedure." Moreover, one of the two contracts was of a cost-plus-a-fixed-fee variety. The only remote resemblance to the Acme claim is the claim for amounts expended by Norris on his farm and partially allocated to the contract claim, as to which the plaintiff furnished the Government complete details many months before filing its price determination request.

CONFLICT OF INTEREST STATUTES

The final species of fraud which defendant urges to vitiate the contract centers on the employment by plaintiff of Harold J. Lee and Charles G. Hochstuhl, aspects of which employments are said to collide with sections 281 and 284 of title 18, and section 99 of title 5, United States Code. These are three of the several code provisions directed to conflict of interest situations which were superseded by Public Law 87-849 (76 Stat. 1119; 18 U.S.C. 201-218), enacted October 23, 1962, as an omnibus exposition and revision of all statutes in the field of conflict of interest, bribery and graft relating to Government employment. Since the acts complained of occurred prior to the omnibus measure they must be tested against the law then extant, but useful advice [fol. 69] as to the intent of the superseded statutes is available from the legislative background and content of the latest compendium. A review of the facts relevant to the employment of Lee and Hochstuhl is first in order.

In the early stages of contract performance Acme was experiencing production problems relating to machines and tooling supplied by the Government under a companion facilities contract. At Acme's request Watervliet Arsenal ordered Harold J. Lee, a machinist lead foreman at the Arsenal, to report to plaintiff's Lansdale plant for the purpose of assisting plaintiff in its technical problems. Under his official orders Lee worked at plaintiff's plant from his arrival on April 20 until April 24, 1953, at

Government expense. Plaintiff requested the Arsenal to loan Lee's services for an additional week at Government expense, but this was refused. Instead, Lee was given official permission to remain at the plant, advising plaintiff in an absent-without-pay status from April 27 to May 1, 1953. During this latter period he worked 96 hours and was paid by the plaintiff $470 plus his hotel expenses, at the rate of $5 per hour compared to his Government salary rate of $2.60 per hour. The amounts paid by Acme to Lee were charged against Contract 1213. Plaintiff was pleased with Lee's services and commended him to Watervliet Arsenal. Upon his return Lee filed with the Arsenal a trip report. The trip report, which is quoted verbatim in finding 39(b)(1), described the production problems he had observed and the advice he had given Acme personnel in order to solve some of the problems. In large part the report reflects inexperience on the part of Acme's personnel and their lack of necessary equipment. There is no evidence of impropriety on the part of plaintiff with reference to Lee, independent of the propriety of his being hired at all. The defendant concedes in its brief that Lee's employment by Acme did not affect his impartiality, a fact which is evident from the contents of his report and the effect of his testimony as a witness.

After Contract 1213 was awarded to Acme, Charles G. Hochstuhl of POD was assigned to administer it, along with a number of other contracts, under the immediate supervision of Harry Oschwald. In this capacity Hochstuhl journeyed to Ohio in March 1953 in the company [fol. 70] of Acme officials to show them existing gun-manufacturing facilities. On his return to POD he submitted a voucher for his per diem and other trip expenses, and was paid the same. Adolph Gromada of Acme had paid $12.50 for Hochstuhl's hotel room charges on the trip, and this expense was charged by Acme against the contract in suit. Hochstuhl's duties at POD in connection with Contract 1213 included recommending changes in the delivery schedule, for review by Oschwald.

Hochstuhl was removed from his position with POD effective August 4, 1953, "* * * for making material false

statements and exaggerations on your application standard Form 57," relating to some prior private employment. During his notice period he looked for other employment and was employed by Acme in August 1953 immediately following his release from POD. POD advised Acme at the time, in Hochstuhl's words, that he "would be limited for a period of two years after being separated from the Government, which would restrict [him] in not negotiating any prices of any legal matters, any technical involvements of the contract, as a contractor's representative to any individual Government employee." If POD's advice to Acme was in writing it is not in the record.

During the first few weeks of his employment by Acme, Hochstuhl helped Norris as a subcontract expediter. After Norris was discharged in September 1953 and replaced by Jack Epstein as superintendent of the Lansdale plant, Hochstuhl was appointed as Epstein's assistant. As such he was given a variety of assignments, all of them relating in one form or another to paper work. He helped to establish a control system for subcontracts, correlated many details relating to Acme's several Government contracts, maintained quality control records, prepared letters to Ordnance from Acme for signature by others, correlated plant inspections by inspectors for Acme and the Government, handled various matters with reference to the records covering Government-furnished machines and tools, and helped in the preparation of requests for change orders. He did not make personal contacts with Government representatives in connection with plaintiff's Government contracts.

In the fall of 1953 he came across a number of vouchers and other cost records in Acme's files which related to re- [fol. 71] pairs made by Acme to Government-owned machines supplied under the Facilities Contract 1214. On his own volition and in the interest of keeping adequate cost records should need arise for them, he undertook to segregate and allocate the cost records to individual machines, and thereafter as additional repairs were made to the machines he kept a running record of them as to each machine. There is no suggestion that this record in its inception was made for the purpose of a claim against

the Government by Acme, since as of the fall of 1953 there was no prospect of the contract cancellation in July 1954. Under date of January 1954 he prepared a chart which depicted certain facts pertaining to Government-furnished machines, such as when they were ordered and received, the periods they were out of operation or not functioning properly and the reasons, and the nature and cost of repairs.

In September 1954 at the direction of his superiors Hochstuhl prepared an up-to-date record of Acme's expenditures in repairing the various Government-owned machines. This record was based on the records he had compiled a year earlier and had kept current in the meantime. The cost record was attached to the letter from Acme (singed by Mr. Cohen, its secretary-treasurer) to POD on September 7, 1954, in which plaintiff refused to return the machines to the Government unless POD gave assurance that Acme would be reimbursed for its cost of repairs. These facts are set forth in finding 53. Other than as described there is no evidence that Hochstuhl prosecuted a claim against the Government as Acme's agent.

The texts of the statutes relevant to this inquiry are as follows:

18 U.S.C. 281

§ 281. Compensation to Members of Congress, officers, and others in matters affecting the Government.

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, ac-
[fol. 72] cusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval com-

mission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

* * * *

18 U.S.C. 284

§ 284. Disqualifications of former officers and employees in matters connected with former duties.

Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than $10,000 or imprisoned not more than one year, or both.

5 U.S.C. 99

§ 99. Ex-officers or employees not to prosecute claims in departments.

It shall not be lawful for any person appointed as an officer, clerk, or employee in any of the departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee.

50 U.S.C. App. 1223

§ 1223. Prosecution of claims against United States by former personnel.

Nothing in sections 281 and 283 of Title 18, or in section 99 of Title 5 shall be deemed to prevent any

person by reason of service in a Department or the Board from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any claim against the United States (1) involving any subject matter directly connected with which such [fol. 73] person was so employed, or (2) during the period such person is engaged in employment in a Department or the Board.

(Note: This last was section 113 of the Renegotiation Act of 1951.)

For purposes of brevity the involved statutes will be referred to by their respective section numbers, omitting the title reference. Similarly, where pertinent, section 207(a) of title 18 as it was enacted by Public Law 87-849 on October 23, 1962 will be referred to by its section number. On March 1, 1958 the House Committee on the Judiciary published a House Committee Print of a Staff Report to Subcommittee No. 5, entitled "Federal Conflict of Interest Legislation". This report, covering 95 pages, contains a comprehensive survey of the legislative and judicial history and background of all of the statutes then relating to conflict of interest, bribery and graft, recommendations for suggested revisions, and constitutes an important basis for the action of Congress in the passage of Public Law 87-849. It will be referred to where relevant simply as the Staff Report.

We first consider the legality of Lee's employment by Acme, which defendant says violated section 281. That part of section 281 relevant to our problem prohibits Government employees from accepting compensation for services in relation to prosecuting a claim against the United States. It is not seen in what way Lee's employment by Acme related to prosecution of a claim. Certainly he was never prosecuted for such a violation. It is clear from the wording of section 281 that it is directed at paid lay or professional advocacy by a Government employee in support of a claim by private interests before a department or agency. This construction also finds strong historical support from the statement by

Senator Trumball, chairman of the Judiciary Committee which reported the lineal forebear of section 281, during the Senate debate (Congressional Globe, Part 1, 38th Congress, 1st Sess., 561):

> This is not a bill to prevent attorneys from practicing in courts of law, but it is a bill to prevent Representatives and Senators in Congress and officers of the Government who are paid for their services from receiving a compensation for prosecuting claims [fol. 74] in the departments and before the bureaus of the Government, and before courts-martial.

An examination of the Staff Report (pp. 19-28) makes it abundantly clear that section 281 does not remotely apply to the services rendered Acme by Lee. There is no reason to believe that 50 U.S.C. App. 1223 alters this result, for the prosecution of claims to which it relates corresponds to the concept of claims covered by section 281.

Undoubtedly all departments of the Government have internal personnel regulations which control the outside activities and employment of its employees, just as those regulations of the Federal Housing Administration which were involved in *Indiviglio* v. *United States*, 299 F. 2d 266 (Ct. Cl. 1962), which regulations prohibited outside employment or activities of its employees without advance approval of those in charge of personnel. No such regulations of the Department of Defense have been cited by the parties in their briefs, but assuming they exist it would seem that the approval given by Lee's superiors at Watervliet Arsenal to his temporary employment by Acme would satisfy any formal objections that might be made at this time. It may well have been poor judgment for Acme to hire or the Government to permit the hiring of Lee's services under the circumstances, instead of detailing Lee to an extra week at Acme's plant on the Government payroll. The fact remains that his services were of value both to Acme and the Government, and there is no indication that Lee's impartiality was affected, a fact which the Government concedes in its brief. The defendant again cites *Mississippi Valley Generating Com-*

pany v. *United States*, 364 U.S. 520, 550, to the effect that an analogous statute (18 U.S.C. 434) "is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest Government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." Of course, it is clear that the court was there considering violation of a public policy expressed in a specific criminal statute, while it now appears that Lee's activities were not covered by 18 U.S.C. 281 or any other statute brought to our at-[fol. 75] tention by the defendant. It would show light regard for the plaintiff's rights to forfeit its claim on the vague argument that a public policy has been violated without a clear showing of the public policy in statutory form.

We advert now to Hochstuhl, whose participation in the preparation of Acme's claim for reimbursement of its expenses in the repair of Government-furnished machines is alleged to have violated code sections 99 and 284, *supra*. At the outset it should be observed that, as ill-advised as it seems in retrospect for Acme to have hired Hochstuhl to help in the paperwork performance of the same contract he had been helping the Government to administer prior to his discharge, the potential conflict in this fence-jumping does not by itself seem to have been prohibited by any statute then in force. Perhaps it would come within the prohibition of the recent section 207, *supra*, except for the Constitutional problem of applying a new penal statute to punish past conduct. But that is not germane to the issue.

The Staff Report alluded to earlier, after a detailed analysis of section 284, states that it "may thus be viewed as an offshoot of section 99 of title 5, converted into a criminal prohibition and broadened in its impact on persons, but sharply limited in its coverage of subject matter". It is, says the Staff Report, quoting from Dembling and Forrest, Government Service and Private Compensation, 20 George Washington Law Review 174,268 (1951), designed "to prohibit fence jumping on claims against

the United States and thereby prevent fraud, collusion, the improper use of personal knowledge and inside contacts, and undue motivation for employees to act with an eye to future employment by private claimants".

Even if Hochstuhl had acted as a prime mover in prosecuting Acme's claim against the United States there would be genuine doubt that section 284 would apply because in the words of the Staff Report, "Existing secondary authority agrees that the subject matter directly connected with which the employee must have been employed or performed duty means a particular claim or case rather than the general field in which the employee worked." Translated into our situation, the claim which Hochstuhl is accused of prosecuting was not a subject matter directly connected with Hochstuhl's Government [fol. 76] employment since it did not materialize as a claim until considerably after Hochstuhl was discharged from the Government. His Government employment involved the contract in suit but the "subject matter" to which the section refers would be the particular claim arising from the contract.

Going further, it would also be questionable if the services rendered by Hochstuhl in compiling data on which his superiors based a claim which they presented to the Government would amount to "prosecution" of the claim by Hochstuhl. In the first place the basic data was first assembled by him before there was any specific thought of a claim, purely as a matter of record keeping. Next, his participation in the total claim process was merely clerical in nature. Other personnel in plaintiff's employ could just as readily have performed the relatively simple duties involved in compilation of costs relating to repair of machines as Hochstuhl did, and his prior Government service gave him no special knowledge or inside contacts which contributed to his undertaking in any way which can be seen. Certainly the statute requires some degree of advocacy on the part of the individual either as agent or attorney before it can amount to prosecution of a claim, as contrasted with the complete absence of evidence that Hochstuhl even participated in the presentation of the claim to the Government after he had completed his

assignment. If Hochstuhl had been indicted for violation of this criminal statute, which he was not, it is highly unlikely in this writer's opinion that his actions could have been found to offend the statute beyond a reasonable doubt. The strict construction which general principles of law require be given to statutes involving forfeitures would hardly permit a finding that Hochstuhl's actions violated section 284. Since the particular provisions in section 284 which have been analyzed as they apply to this case are *in pari materia* with comparable provisions in section 99, what has been said as to the deficiencies of 284 with respect to the instant case is largely apropos of section 99 as well. In fact, section 99 is even more precise than 284 in requiring that the claim be one which was pending before the department while the individual was still an employee there.

[fol. 77] In an effort to understand the Congressional intent in the various conflict of interest statutes which are involved considerable reliance has been placed on the Staff Report of the House Judiciary Committee. Aside from the specific authority given by section 2507(c) of title 28, United States Code, for this court's use of printed and recorded reports of Congressional committees, use of this Staff Report is justified on the grounds that it is a highly professional text on the subject, that the omnibus measure enacted by Congress in October 1962 (P.L. 87-849) mirrors to such an extent the recommendations made in the Staff Report that it tokens a ratification by Congress of the views expressed in the report, and that it is therefore not only a reliable reflection of the Congressional intent behind the superseded laws but is also a work of legal scholarship fully deserving as much respect as standard legal texts in other fields. Moreover, the accuracy of the legal precedents which it cites has been verified.

In view of the results reached above there is no need to evaluate the plaintiff's objection that the defendant did not formally raise the issue as to conflict of interest violations until the filing on March 8, 1961 of its anwser to the third amended petition in this case, although it was fully aware of the grounds of such defense some years earlier.

GOVERNMENT-FURNISHED MACHINES; DELAYS

The plaintiff contends that the defective condition of certain items of machinery furnished by the defendant under a so-called Facilities Contract, some of which machines were also used by its subcontractor, All Metals, was responsible for its inability to adhere to the original and subsequent delivery schedules under Contract 1213, and was thus responsible for not only the incurrence of unreimbursed costs of machinery repairs in excess of those anticipated, but also in principal part for the delays which led to the assessment of liquidated damages for delinquency in deliveries. Plaintiff seeks to recover these costs and to have remitted the liquidated damages which have been withheld. The defendant contends that the machinery it furnished plaintiff was not defective but was usable, that plaintiff's difficulties in its use were attributable to improper installation and operating incompe-
[fol. 78] tence, that plaintiff's actual cost of repairs and installation was well within its original estimate, that $37,358.58 of the amount spent by plaintiff for special tooling was included in its bid price (as amended by Supplemental Agreement No. 6) and the balance was plaintiff's responsibility under the terms of the Facilities Contract, and that the part of plaintiff's delays not attributable to its own deficiencies was attributable to the failure of All Metals to adhere to subcontract delivery schedules.

Of 19 machines furnished by the Government under the Facilities Contract, six were provided pursuant to the basic contract and the balance under successive supplements. The plaintiff agreed to pay the cost of freight for all 19 machines and tools furnished by defendant, plus the installation and repair costs of the first 11 machines furnished, including the initial six under the basic contract. Special tooling was also to be plaintiff's responsibility.

Most of the machines arrived at the Lansdale plant at various dates from February 13 to June 9, 1953. They were large and heavy. For proper operation they required solid, level installation to prevent misalignment, vibration and movement. There is a wide discrepancy in

the testimony and other evidence as to the adequacy of plaintiff's installation, as described in finding 38(b). For reasons given there it has been concluded that improper installation of the machines played a relatively unimportant role in plaintiff's production delays.

The condition of the machines is also the subject of diametric disagreement as evidenced by the extensive data presented in findings 39 and 40. The Government maintained a so-called "historical record" of each machine which described it in detail, listed accessories which accompanied it in Government storage, recited its source and successive uses fragmentarily, and reported its condition by means of a code shown in the schedule in finding 36. The historical record was not a reliable reflection of the condition of the machines for there were gaps in the sequence of uses and the coded condition ratings were contradictory, often indefinite as to time, and based on visual inspection instead of on operating experience. The machines were not tested prior to delivery to determine their operating condition. In any event a visual inspec- [fol. 79] tion would have disclosed only externally visible defects, whereas more vital defects could only be determined under operating conditions after installation.

Throughout the period of contract performance the plaintiff frequently complained to the defendant that the machines were defective, and on numerous occasions the defendant sent inspectors and other technical personnel to investigate the complaints and to render assistance to plaintiff. A series of these complaints and reports by inspectors are reprinted in finding 39(b) to throw contemporaneous light on the condition of the machines. These, plus data from the historical records and the plaintiff's record of expenditures on the machines, all of which are described in detail in finding 40, lead to the conclusion that collectively, the condition of the machines did not measure up to what the plaintiff might reasonably have expected under the promise of the Facilities Contract to furnish machines in fit operating condition, even though the parties contemplated machines which would need repairs, special tooling and accessories to be provided at the plaintiff's expense to perform the related supply contract.

The court had recent occasion to consider a Facilities Contract involving questions comparable in limited respects to the present one. *Ekco Products Company* v. *United States*, 312 F. 2d 768 (Ct. Cl. 1963). There the plaintiff charged the Government with breach of a warranty of fitness as to Government-furnished machines whose defective condition resulted in delay damages in performing a related supply contract. The court found that Ekco's lack of experience and delay of its own making contributed to its losses flowing from one of the supplied machines, as is true in the instant case. But as to other supplied machines it was held that, although the Facilities Contract was silent as to a warranty of fitness, the bailor-bailee relationship between the parties imposed on the Government "an obligation that the thing or property bailed for use shall be reasonably fit for the purposes, or capable of the use known or intended". The obligation was not impaired by the right given in the contract to inspect the machines in advance of acceptance because, as here, "it is clear that it was almost impossible to determine whether the machines would do their job [fol. 80] properly until they were actually installed in the production line and put into operation. * * * Under the circumstances, we are constrained to hold that the right of inspection and acceptance exercised by plaintiff did not defeat the warranty of fitness."

Knowing that the plaintiff had had no previous experience in the use of machines suitable for gun manufacture, it would seem incumbent on the Government to have furnished it machines which, while they might require initial repairs of a normal nature to place into operation, would not require the constant tinkering and involve the repeated failures and breakdowns which were experienced with some of the machines, even leading to the replacement of certain ones at a later time. The fact that some of the machines performed reasonably well if properly operated did not permit a smooth flow of production if other machines essential to a sequence of operations broke down. There is some support in the conclusion as to the overall condition of the machines in the continuous assistance and advice which the Government rendered to the plaintiff throughout the contract, in the generous time extensions

given, in the replacement of some of the machines, and in the defendant's admission in Supplemental Agreement No. 3 that the late delivery of Government machines requiring excessive repairs was justification for a time extension. Some inferences too are drawn from the absence in the record of written denials or responses by the Government to the numerous written complaints of the plaintiffs set forth in finding 39(b). It is true that the troubles which the plaintiff experienced in the operation of the machines were compounded somewhat by installation defects, and to a larger extent by the demonstrated inexperience and incompetence of plaintiff's personnel. Too, All Metals' failure to deliver subcontracted components (finding 42) was at least of equal significance in the delays which plaintiff experienced. To some extent the delays coexisted, so that even if the plaintiff had experienced no delays from defective machines, it would have been delayed by the failures of its subcontractors. There is no way to assess accurately the comparative effect of the various delay factors in terms of time or cost, but it is reasonable to conclude from the weight of the evidence that the defendant was responsible for one-third of them [fol. 81] and the balance was the plaintiff's responsibility either directly or by imputation.

Under the terms of the Facilities Contract, if the machines were delivered either late or not in fit operating condition the plaintiff's only recourses were either to reject them (not often possible until the machines were placed in operation) or to request an equitable price adjustment in Contract 1213. Plaintiff was specifically precluded from reimbursement for the costs of repair, rehabilitation or restoration of the machines, or from recovering damages for their delay in delivery, or delivery in unsatisfactory operating condition. The defendant verified the facts that plaintiff spent a total of $82,264 in installing, repairing, and purchasing special tooling and accessories for the machines during the life of the contract. As itemized in finding 43(b), the plaintiff had allowed $37,358.58 in its bid for special tooling, and expected to spend $15,000 for installation and repair expenses. It is difficult if not impossible to distinguish in

many cases the difference between repairs, special tooling and accessories, so that no precise segregation of the plaintiff's total expenditures on the machines can be made. However, giving the plaintiff the benefit of the doubt it would seem that of the $82,264 expended, $63,781.41 went for special tooling (including expendable items consumed in use such as cutter blades, honing stones, etc.), and $18,482.59 went for installation and repair costs. Without question the plaintiff was responsible for shouldering the costs of special tooling, and the fact that it spent at least 44 percent more than it had allowed in its bid for special tooling simply reflects a bad guess that cannot be blamed on the Government. If it spent $18,482.59 on installation and repairs this was roughly in keeping with the $15,000 it had expected to spend, particularly when one considers that the latter figure was based on the anticipation of only six machines instead of the eventual total of 19. Under these assumptions there would be little justification to warrant an equitable price adjustment to pay for plaintiff's excessive costs. But the cost of repairs and special tooling is no criterion of the difficulties and delays which the subpar Government-furnished machines occasioned plaintiff, and should plaintiff be ultimately entitled to damages they should take into account the delay [fol. 82] factor in each area of costs affected by the delay, in the proportions previously found. Furthermore, the delays will also affect the issue of liquidated damages yet to be discussed.

One feature of the Facilities Contract deserves special comment before leaving the subject. In addition to the agreement to furnish specified machines and tools, the contract also binds the Government to provide "manufacturing aids available from Watervliet Arsenal", a cryptic term whose promise has no definable limits. On the one hand it could mean nothing beyond that which was particularized, an unlikely supposition. Or it could be stretched to include those accessories listed in the various historical records as accompanying particular machines in Government storage. Further out, it could even be interpreted to embrace any and all accessories and special tooling items within the confines of a well-stocked Water-

vliet Arsenal which would be usuable in connection with the basic machines for manufacturing the guns called for in Contract 1213. Such ambiguities are highly undesirable in Government contracts. The parties have not stressed this point. Nothing more need be said.

LIQUIDATED DAMAGES

Throughout the contract plaintiff was in arrears of the delivery schedule provided in the basic contract, for reasons described elsewhere in this opinion. The original delivery schedule was substantially revised on two occasions by the Government by the issuance of Supplemental Agreements Nos. 3 and 7 in August 1953 and January 1954, respectively. The effect of these time extensions is described in finding 45. Supplemental Agreement No. 3 assigned as reason for the modification in delivery requirements the late delivery of Government facilities requiring excessive repairs. Supplemental Agreement No. 7 gave as reason the issuance of a temporary stop order in August 1953 affecting a subcontracted component which "drastically reduced Contractor's ability to make deliveries in August and in September 1953". In limiting the reasons for plaintiff's delays to those cited in the Supplemental Agreements, POD was being more tolerant and considerate to the plaintiff than it was being objectively accurate, for as has been said the plaintiff and its subcon- [fol. 83] tractors were the authors of much of their own problems causing delays. The effect of the two time extensions, as detailed in finding 45, was generally to forgive plaintiff its past arrears and establish more realistic delivery dates for the future, with some exceptions.

Despite the time extensions the plaintiff was in arrears in delivery prior to cancellation of its contract in July 1954, and was assessed liquidated damages of $56,316.08 pursuant to the contract clause (finding 15). $55,568.25 of this was for late gun deliveries and the balance for late accessories. $53,715.19 of the amount assessed (including an erroneous overcharge of $1,700.34) was withheld from payments otherwise due the plaintiff and the remaining $4,301.23 was assessed but not withheld or collected. The footnote to finding 46(b) explains another minor over-

assessment of $286.53 detected in the course of preparing the accompanying report.

The plaintiff contends first that the assessment of liquidated damages was not supportable because the applicable contract clause exempts the plaintiff if the delay arose "out of causes beyond the control and without the fault or negligence of the contractor". This is negatived by the facts already found. It then advances the holding in *Dewey Schmoll* v. *United States*, 91 Ct. Cl. 1, 28:

> * * * In several cases we have held that where delays are caused by both parties to the contract the court will not attempt to apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled.
>
> * * * In *United States* v. *United Engineering Co.*, 234 U.S. 236, 242, it was held that—
>
> > * * * when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages * * * for each day's delay, * * * the other party must not prevent the performance of the contract within the stipulated time,
>
> and in such a case, though the completion of the work is delayed by the fault of the contractor, liquidated damages are waived.

The principles announced in the *Dewey Schmoll* and *United Engineering Company* cases, *supra*, are still valid. As stated in the latter case—

[fol. 84] > * * * Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date, to do this would permit it to recover damages for delay caused by its own conduct.

Such a result is fair; it does not deprive the Government of an opportunity to prove and recover its actual damages caused by the contractor's delay; it merely waives the Government's right to insist on an artificial measure

of damages fixed by agreement of the parties in contemplation of a delay to which the Government did not substantially contribute. The facts in this case could hardly support actual damages to the Government brought about by the plaintiff's arrears in deliveries, since contemporaneously with cancellation of the contract the Army had decided to discontinue military requirements for the particular gun being manufactured by plaintiff because it was obsolete and superseded, a circumstance which the plaintiff asserts vigorously but unsuccessfully was the prime reason for cancellation of its contract (see findings 47-50). Plaintiff was improperly assessed liquidated damages.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Sprouting from the liquidated damages issue is the defendant's contention that the plaintiff failed to exhaust its administrative remedies; specifically that it did not request a decision by the contracting officer on the cause of its delays in deliveries as purportedly required by clause 10 of the contract. Clause 10 (see finding 15) prescribes for the assessment of liquidated damages and inserts a new paragraph (f) in General Provision No. 11, Default. The effect of paragraph (f) is to excuse the contractor from the assessment of liquidated damages when the delay arises out of causes beyond his control and without his fault or negligence. It says that in such case, subject to the Disputes clause, "the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance when in his judgment the findings of fact justify an extension". Thus far there is no express requirement for the contractor to request a decision by the contracting officer on the cause of its delays. Does the incorporation by reference of the Dis-
[fol. 85] putes clause impose such a requirement? The Disputes clause (finding 15) is General Provision No. 34 of the contract. On this point it says merely that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting officer, * * *." It cannot be

said that this language imposed a requirement to make a specific request to the contracting officer for a decision on the cause of delays. So long as the contracting officer was put on notice that the plaintiff wanted to avoid the effect of liquidated damages by deletion of the provision, or by forgiveness because it did not feel responsible for the delays, it would seem that all requirements of the contract would be met. This is precisely the effect of a letter sent on May 20, 1954 by plaintiff to the Comptroller General via POD, which the contracting officer refused to forward to the Comptroller General, even after plaintiff's renewed request in June 1954 for him to do so, because he felt that the appeal was addressed to equitable rather than legal considerations and thus would not be cognizable by the Comptroller General. POD accepted the letter as an appeal for relief from liquidated damages. *Specialty Assembling and Packing Company, Inc.*, v. *United States*, 298 F. 2d 794 (Ct. Cl. 1962) requires some degree of specificity in connection with a claim made pursuant to the Changes clause in a contract, but does not require the claim to specify the particular clause of the contract under which relief is sought.

Contract provisions requiring the contractor to assert its rights in a particular form and manner are to be given a reasonable interpretation. Requests must be sufficient to put the Government on notice of the existence of a claim or a dispute and, at least by implication, invite a ruling. But there should be no formal requirement of magic language. In the case at bar the contract imposed no clearly expressed requirement of a request by the plaintiff to the contracting officer for a ruling by the latter on the causes of delay; and if it did so by innuendo, then the plaintiff's letter requesting relief from liquidated damages was adequate compliance.

Of course, the plaintiff's failure after contract cancellation in July 1954 to file a formal request for a decision on the causes for delay, even if that were deemed to have [fol. 86] been required by the contract, would have been superfluous. Cancellation of the contract so effectively annihilated it that the plaintiff was under no obligation to proceed by way of its provisions, and thus was not required to exhaust its administrative remedies.

ASSIGNMENT OF CLAIMS ACT

The final defense to this action is that the plaintiff assigned $275,000 of its claim to the National Molasses Company in violation of the Assignment of Claims Act, which is taken to embrace either 31 U.S.C. 203 or 41 U.S.C. 15, or perhaps both. The distinction is immaterial for our present purposes.

To condense the facts covering this issue which are described in detail in finding 58, *infra:* Acme owed money to its sister corporation, National Molasses Company, and had secured it with certain mortgages. Early in 1960 settlement was considered imminent with the Government on the instant claim. Acme and All Metals had jointly agreed that the proceeds of settlement would be deposited with a bank for distribution in agreed proportions, and the bank had accepted this authorization to act. Settlement negotiations were protracted. In August 1960 the plaintiff executed an "assignment" to National Molasses Company of up to $275,000 of the proceeds of any settlement which might be consummated. The purpose of the transaction was to provide further security to National Molasses Company for its debt. The settlement never materialized. These circumstances do not constitute an assignment by Acme of its claim against the Government. The plaintiff merely earmarked a certain portion of settlement proceeds for National Molasses Company. It did not relinquish its claim, no more than National Molasses acquired an unenforceable claim. Nor was there any intent on the part of Acme to relinquish or assign its claim. Failure of the settlement to materialize left Acme's claim where it was before the purported assignment. The defense is not made out.

JUST COMPENSATION

The final matter left for adjudication before discussion of the damage issue is the plaintiff's demand for interest [fol. 87] from January 1, 1955 on those parts of its overall claim for damages represented by the assessment of liquidated damages and withholding of amounts due it under the price redetermination provision of the contract.

These amounts, says the plaintiff, were retained by defendant without any color of right and thus come within the purview of the Fifth Amendment's guarantee that property shall not be taken for public use without payment of just compensation. This type of demand is not novel in suits on Government contracts, nor is its steadfast repudiation by the courts. *United States* v. *North American Transportation & Trading Co.*, 253 U.S. 330, 336 (1920); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947); *Ramsey* v. *United States*, 121 Ct. Cl. 426, 430-433; *Komatsu Mfg. Ltd.* v. *United States*, 132 Ct. Cl. 314; *Mississippi Valley Generating Co.* v. *United States*, Ct. Cl. No. 479-54, decided July 15, 1959, page 29 of Slip Opinion, reversed on other grounds, 364 U.S. 520 (1960).

Plaintiff concedes that, where a proper dispute exists as to entitlement to an item of damages in a contract action, recovery of interest under the guise of just compensation is prohibited by 28 U.S.C. 2516(a) which permits this court to allow interest on a claim "only under a contract or Act of Congress expressly providing for payment thereof." It is not clear why the absence of a dispute would rescue a monetary claim from the constraints of the section referred to. As a specie of property it is conceivable that money could be taken by the Government under circumstances constituting a compensable taking in the Constitutional sense, and no doubt the absence of any right other than the naked power of the sovereign would be a necessary element in plaintiff's proof. But in the present case the plaintiff's right to these sums has been vigorously disputed in any event, and that would seem to destroy plaintiff's theory. The Government withheld liquidated damages as a matter of contract right according to its belief, and the determination arrived at in this opinion that liquidated damages were not properly assessable came about because of the plaintiff's dispute. Similarly, so far as can be ascertained the Government had just about concluded at time of contract cancellation [fol. 88] that the plaintiff would be entitled to a ceiling price on its application for price redetermination but had withheld this along with other entitlements because it

honestly believed that plaintiff's conduct merited forfeiture. In neither case, therefore, was the alleged taking without color of right, and the fact that a court may determine nine years later that the premises were faulty does not alter the character of the Government's original action so as to convert into a taking that which was something else.

DAMAGES

This is the question as to damages: Where the Government unjustifiably cancels a supply contract after part performance at a time when the contractor's production costs have exceeded the contract price and it is reasonably shown that he would have continued to produce at a reduced rate of loss had the contract not been canceled, is he entitled to consider the contract as rescinded and recover his total unreimbursed costs to date of cancellation so as to restore him to his precontract *status quo*, or is he restricted to a suit for damages under the contract which would limit his recovery to the contract price? The question of All Metals' damages is comparable except as to a substantial modification of the loss factor.

The parties sharply disagree on the answer. Both subscribe to the orthodox but elastic standards of damages for breach of contract, which rests on the contract itself including its price provisions. While the defendant holds this relief to be exclusive, the plaintiff contends that, since the yield is greater, it may elect to follow the course of rescission and restitution, ignore the contract terms, and obtain restitution of all of its unreimbursed proper costs. This theory, which is vigorously opposed by the defendant, is kin to *quantum meruit* in that it is based upon a concept of unjust enrichment but (according to plaintiff) is measured by chargeable performance costs. If valid, it would seem to be particularly attractive to claimants producing at a prospective loss, for it would free them from the limitations of the contract price, especially where they have negligently accepted a dangerously low contract price. For this if for no other reason it deserves wary scrutiny.

[fol. 89] Restitution and compensatory damages are types of remedies for breach of contract. Their simultaneous availability at the option of the injured party in a given case depends on the circumstances of the case. Whereas compensatory damages should always be available, the same cannot be said for restitution which requires for its application the existence of special conditions. The distinction between the two remedies is not always well-defined. In actions for compensatory damages the effort is made to attain the realization in value of a performance promised by the defendant, with the purpose of putting the injured party in as good a position as he would have occupied had the contract been fully performed by the defendant. Restitution tries to give the plaintiff the value of a performance which he has rendered for the defendant and which the latter has received, so as to restore the injured party to as good a position as that which he occupied before the contract was made. *Restatement of the Law of Contracts*, sections 326, 347; *Rumley* v. *United States*, 285 F. 2d 773 (Ct. Cl. 1961); *New York Mail & Transportation Co.* v. *United States*, 139 Ct. Cl. 751 (1957). The value of the plaintiff's performance in the remedy of restitution may in some cases be the extent to which the defendant has been enriched by the plaintiff's services, or in others the "amount for which such services and materials as constituted the part performance could have been purchased from one in the plaintiff's position at the time they were rendered." *Restatement*, sec. 347, comment c. A defendant who breaks a contract must have something to give back to the plaintiff before restitution can apply, and he cannot do so if he has received nothing. He has received nothing, for example, if the plaintiff has merely invested large sums in preparations to perform a contract but has delivered nothing at the time of the breach. This proposition is evidenced in the following quotation of comments *c.* and *d.* of section 348 of the Restatement:

> *c.* If the performance that the contract required of the plaintiff has been wholly prevented, and if the result of his labor and expenditure still belongs to him, he has no remedy by way of restitution. If the

performance required was the production and delivery of a finished article, and the defendant wrongfully prevents completion and delivery of the article, the [fol. 90] plaintiff cannot get judgment for the reasonable value of his work and labor in preparation to perform, except so far as it may be included in a claim for damages. Such work and labor is not itself requested or received by the defendant.

d. The expenditures of the plaintiff in part performance of the contract or in preparation therefor can be proved in certain cases as a means of determining the amount of damages for which judgment will be given, even though neither the money nor its product has been received by the defendant. The remedy sought, however, is damages and is governed by the rules applicable thereto; it is not restitution. The matter is dealt with in § 333.

Thus, the plaintiff misconceives the doctrine of restitution. It does not, as the plaintiff mistakenly believes, call for a return to plaintiff of all of its costs expended in partial performance unless those costs should happen to be the equivalent of the value which the Government has received. We know this cannot be so, however, for much of the costs invested by plaintiff in performance of the contract up to the time of its termination were allocable to the terminated portion for which the Government had not received value. The only value the Government could be held to have received would be represented by the completed guns which plaintiff had delivered to the time of termination. The contract price would be non-conclusive evidence of the value received by the defendant in the form of delivered guns, but even if that value were to be swollen to unrealistic proportions it would fall far short of the plaintiff's total costs which are demanded. This is so because a large amount of those costs represented waste and inefficiency of one form or another, and still other costs related to guns not yet produced.

The plaintiff miscasts *Behan* v. *United States*, 110 U.S. 338, as a precedent for the restitution principle, whereas it represents in reality a statement of the elements of

damage recoverable in a suit for breach of an express contract. It does not measure the plaintiff's loss by the value of its performance to the defendant as restitution requires. Instead *Behan* merely says in paraphrase: "The Government illegally cancelled the plaintiff's contract. We know how much the plaintiff spent in valid performance costs up to the time of termination and this he may recover as a *prima facie* measure of damages, but [fol. 91] we do not have enough evidence in the record to project the contract through to completion so as to determine whether the plaintiff would have made a profit or loss had he completed it. If the plaintiff could prove that he would have made a profit he would be entitled to have it added to his proven costs. Conversely, if the Government could prove that plaintiff would have suffered an overall loss on completion, the loss would have to be deducted from his costs." This is implicit in the decision coupled with the Court of Claims opinion which preceded it.

There is a line of authority commencing with *United States* v. *Zara Contracting Co.*, 146 F. 2d 606, which holds to the effect, usually in suits under the Miller Act (40 U.S.C. 270(a), *et seq.*), that upon an unjustified total breach of a contract the injured party can forego a suit on the contract for damages and can instead elect to recover the fair value of the services rendered irrespective of the contract terms. The contract price is admissible evidence of fair value but is not conclusive. See *Wander* v. *Brotherton*, 106 F. Supp. 353; *St. Paul-Mercury Indemnity Co.* v. *United States for the use of H. C. Jones*, 238 F. 2d 917. The view is not unanimous. *Jefferson Construction Co.* v. *United States for the use and benefit of Roy Bacon, et al.*, 238 F. 2d 265, *cert. den.* 365 U.S. 835.

The *Zara* case, et al., can be distinguished on two grounds. First, the doctrine of restitution was held there to be "particularly applicable to unit prices in construction contracts". In that case the use plaintiff was a subcontractor whose excavation subcontract was terminated before completion, and his expenditures up to cancellation were held to equal the reasonable value to *Zara* of his

performance to that time. Whereas the Government had not received any value from those expenditures of Acme which were not chargeable to guns actually delivered, in the *Zara* case the prime contractor was benefited by the amount of excavation the plaintiff had performed up to the time of termination, obviously because that amount of excavation would not have to be reperformed by whoever finished the job.

The second ground for distinguishing the *Zara* line of authority from the case before us is that the Tucker Act under which the Acme suit is brought empowers this [fol. 92] court "* * * to render judgment upon any claim against the United States founded * * * upon any express or implied contract with the United States * * *". 28 U.S.C. 1491. The term "implied contract" means contracts implied in fact and not ones implied in law. *Sutton* v. *United States*, 256 U.S. 575. The Miller Act under which the *Zara* case arose contains no such limitation. Where there is an express contract recovery can be had only upon the implied-in-fact theory. *Lacchi Construction Co., Inc.*, v. *United States*, 102 Ct. Cl. 324, 356 (1945); *Steel Products Engineering Co.* v. *United States*, 78 Ct. Cl. 410, 418 (1933); *Frazier-Davis Construction Company* v. *United States*, 100 Ct. Cl. 120, 162 (1943). See, also, *United States for the use and benefit of Westinghouse* v. *Ahearn, et al.*, 231 F. 2d 353, 356 (9th Cir., 1955); *Klebe* v. *United States*, 263 U.S. 188 (1923); *Hampton* v. *United States*, 82 Ct. Cl. 162, 172 (1935). In such case, as here, the plaintiff is bound by the contract price to which he has agreed, and in the absence of mutual mistake (*Sutcliffe Storage and Warehouse Co.* v. *United States*, 125 Ct. Cl. 297) his recovery is necessarily limited to the contract price plus any other special damages which he may prove were the proximate consequences of the breach. Under the Tucker Act it is only where the action is based on other than an express contract that recovery for unjust enrichment, whether denominated quantum meruit or restitutionary relief, should not be restricted to the contract price as a ceiling, for in such case there is no contract price upon which the minds of the parties have met. It will be noted that this conclusion differs from that

reached by Professor Palmer in his article entitled "The Contract Price as a Limit on Restitution for Defendant's Breach", 20 Ohio State L.J. 2, spring 1959.

The appropriate measure of recovery in this case is "* * * such amount as is reasonably shown by the proof to have resulted from defendant's breaches of the written contract." *Needles* v. *United States*, 101 Ct. Cl. 535, 612; *S. Harvey Klein* v. *United States*, 285 F. 2d 778 (Ct. Cl. 1961). McCormick on Damages, 1935 ed., sec. 142 examines with singular aptness the measure of damages for breach in midperformance. It states in part—

> [fol. 93] * * * the plaintiff may recover past expenses, plus any net profit he would have made if the contract had been performed on both sides; i.e., the difference between the total cost to the plaintiff of full performance, including the actual past expenses, and the price to be paid to the plaintiff on completion, if that is larger * * *.

If, of course, completion of the contract would involve a net loss to plaintiff, then the loss must be applied to reduce the claimed expenditures. Any other result would place a claimant with a losing contract in a better position because of termination than if there had been no breach. This type of windfall is not judicially approved. *Blair, et al.*, v. *United States for the use and benefit of Gregory-Hogan*, 150 F. 2d 676, 678; *Western Oil and Fuel Co.* v. *Kemp*, 245 F. 2d 633, 644; *Restatement*, sec. 333. Justification for deduction of the loss factor is explained in *L. Albert & Son* v. *Armstrong Rubber Co.*, 178 F. 2d 182, 189-190.

Applying the foregoing precedents to the instant case, Acme's recoverable damages computed in the accompanying findings consist of the difference between its losses up to the time of cancellation and its estimated losses had the contract been completed. The logic of this approach is that by illegally canceling the contract the Government deprived Acme of the opportunity of reducing its losses by securing eventual recoupment of certain costs already invested which are not independently susceptible of direct valuation from the present record and must be ascer-

tained through the self-executing medium of projecting the total costs of the contract through to completion. The method automatically adjusts for such imponderables as Acme's costs attributable to (1) its own inefficiency and inexperience, (2) unrealistically low bid, (3) failure of its subcontractors, and (4) defective Government-furnished machines. Acme is charged with the losses it would have suffered in completing the contract, for it is tacitly recognized that its unit cost of producing rifles after cancellation would have remained at a level substantially in excess of the contract ceiling price for the rifles.

The principal areas of the defendant's liability for Acme's excessive costs are those costs caused by the defective machines supplied by the Government, those accruing as a result of cancellation, and those of a liquidated [fol. 94] nature represented by failure to pay for completed deliveries. The means adopted to measure the plaintiff's damages for breach of contract automatically compensate plaintiff for the costs due to cancellation and the unpaid deliveries, but fail to provide for the cost consequences of defective machines. Nor is that any way to compute these costs, even with the help of finding 43 which estimates that one-third of plaintiff's extra delay costs were attributed to defective machines. However, it would appear that these costs would be more than offset by the remission of liquidated damages totaling $56,316, which had been assessed, and the allowance of $3,728 in rejected overtime labor costs. It must be acknowledged that even if the machines had not been partially defective other delays attributable to plaintiff would have resulted in delinquent deliveries for which the plaintiff could have been validly assessed liquidated damages. If damages were to be computed on a theory of restitution, where the reasonable value to the defendant of plaintiff's performance might be measure by plaintiff's *necessary* expenses, it would be as impossible to assign values to the plaintiff's unnecessary costs so as to arrive at the amount of its necessary costs, as it is to compute the dollars wasted because of defective machines.

With respect to All Metals' claim under its subcontract it will be entitled to recover the ceiling price allowed un-

der its subcontract after deducting the properly chargeable amounts already paid and the additional costs which it would have expended to complete the terminated portion of the subcontract.

To the damages for both Acme and All Metals will be added their properly proven and allowable post-cancellation costs which were proximately caused by the cancellation.

As to all subcontractors except All Metals the evidence is insufficient to make a computation similar to that resorted to for Acme and All Metals, so their damages will consist of those unreimbursed costs proven to be properly chargeable to performance of their subcontracts.

Finding 84 summarizes damages in the total amount of $314,802, with $134,241 due to Acme, $148,724 due to All Metals, and $31,837 due to six other subcontractors on proportions described. Findings 61 through 70 present [fol. 95] the details in connection with the amounts found to be due Acme, findings 71 through 80 relate to the details of All Metals' damages, and findings 81 through 84 relate to the other subcontractors. A host of subsidiary problems are dealt with in the separate damage findings, of which one requires additional comment.

Paragraph (d) of finding 67 disallows Acme the sum of $16,506 which accrued in interest on plaintiff's V-loan from the date of contract cancellation to the time the loan was liquidated. The loan was procured in May 1953 to help finance performance of the contract in suit. As of August 31, 1954, there was a principal balance of $109,-151.13 due. If Acme had been paid the moneys found herein to have been due it we are reasonably sure that the moneys would have been applied to liquidate the balance of the loan so that interest would not have accrued. It is unlikely that the Government would have disbursed any moneys to Acme at the time without imposing that condition, for the Government guaranteed 90 percent of the loan to the lender. Section 2516(a) of title 28, United States Code, prohibits the court from allowing "interest on a claim against the United States" unless express provision therefor is made by statute or contract. In *Komatsu Manufacturing Company, Ltd., et al.*, v.

United States, 132 Ct. Cl. 314, it was held that the United States is not liable for interest on borrowed money on its failure to pay the plaintiffs money at the time it contracted to pay. The plaintiff relies on the decision of the Armed Services Board of Contract Appeals in the *Appeal of Tucson Construction Co., Inc.*, ASBCA No. 5106, 59-1, BCA 2266. The *Tucson* case involved a termination of a contract for convenience of the Government. In a well-reasoned opinion it allowed post-termination interest on moneys borrowed to perform the contract because under the terms of applicable regulations it was considered to be as much an item of contract expense as any other cost incurred with respect to the contract. The Board carefully pointed out, however, that 28 U.S.C. 2516(a) was a prohibition against allowance of such interest by the Court of Claims, but did not consider it binding on administrative adjudications authorized by other statutes and regulations. There is a great deal of merit in the Board's analysis of the problem, but the *Komatsu* case [fol. 96] forecloses any doubt as to the matter in this court, and the present claim cannot be reasonably distinguished. The plaintiff contends in its requested findings that, after contract cancellation, the Government discharged its obligation under the V-loan contract by paying off the bank which had made the loan, and thereafter the plaintiff made all further payments of principal and interest to the Government as holder in due course. No part of the record is cited to support this contention and, even though it was probably the case, it cannot be made the basis of a finding to that effect. If that fact were to have been established, however, it is possible that the plaintiff might be entitled to recover the interest item on the basis of *Wire Corporation* v. *United States*, 143 Ct. Cl. 688, where it was held that the Government was not entitled to recover interest on its counterclaim for Federal employer taxes due it by plaintiff where on the date of assessment the defendant was already obligated to plaintiff under a completed contract on which payments were withheld. Given the facts as the plaintiff claims them to be it would seem inequitable to say the least for the Government to collect interest from the plaintiff on the one hand and refuse on the other to pay plaintiff

amounts due under the contract which, if paid, would have prevented the interest from accruing.

All Metals also makes claim for post-cancellation interest on borrowed money which it was unable to pay after cancellation because the Government failed to pay moneys due it. Under the *Komatsu* case, *supra*, this interest cannot be recovered since it constitutes interest on a claim against the Government. A further reason for the denial of All Metals' interest claim is discussed in the opinion and finding 24 of the commissioner's report in *Acme Process Equipment Co., etc.*, v. *United States*, Court of Claims No. 538-59, filed August 6, 1962.

SUBCONTRACTORS' RIGHT TO SUE

The defendant contends that, under the terms of their subcontracts, none of the subcontractors had recourse against Acme and, accordingly, no actions can be maintained in their behalf against the Government. The specific language of the subcontracts governing this issue is [fol. 97] given in finding 83. As to All Metals' subcontract, the situation is precisely the same as that present in the related case of *Acme Process Equipment Co., etc.*, v. *United States*, No. 538-59, now pending before the court on the commissioner's report and opinion filed August 6, 1962. On pages 11-13 of that report there is a discussion of this defense, concluding with the finding that the subcontract language does not preclude the maintenance of the present action in All Metals' behalf. The discussion there is incorporated here by reference to avoid needless repetition.

Each of the subcontracts let to the other use plaintiff subcontractors contained the following provision:

> We [meaning Acme] reserve the right to cancel entirely or to reduce the quantity of material covered by this order.

No extended treatment is necessary to reach the conclusion that this language permitted Acme to cancel the subcontracts in question but did not absolve Acme from responding in damages.

The defendant makes the further contention that Acme is not liable to All Metals, Manalapan, Foley and Nicholson because of the latters' fraud in the arrangements they made with Acme's agents (Tucker, et al.) to obtain their subcontracts. The subject was referred to earlier in this opinion. *Irwin and Leighton* v. *United States*, 106 Ct. Cl. 398, 460, is cited in support of the defendant's position, but is not in point because there the secret kickback by the subcontractor to the manager of the prime contractor was contained in the bill presented by plaintiff to the Government for payment, and was thus a fraud on the Government and a violation of 28 U.S.C. 2514. In the present case if the contract had proceeded to completion and the kickbacks had not been discovered, Acme would have paid its subcontractors precisely what it had contracted to pay them in the various purchase orders, which included without disclosure or designation amounts reflecting commissions paid by the subcontractors as kickbacks to Tucker, et al. In the cases it has cited the defendant has failed to persuade the conclusion that, if Acme had been sued by its subcontractors and had discovered the kickbacks, it could cause a forfeiture of amounts otherwise due the subcontractors [fol. 98] or succeeded in any more than avoiding payment of the kickback element of the subcontractors' claims. It is understood that the commissions paid to Tucker by subcontractors have been removed from the cost claims now before the court for payment in their behalf. If Acme had a full defense to claims by the subcontractors it is then supposed that the Government would be entitled to the benefit of Acme's immunity even if Acme chose not to claim it, but the immunity itself has not been satisfactorily established from the standpoint of law to justify forfeiture of their claims.

CONCLUSION

The proliferation of factual and legal issues in this case has made it difficult to remain conscious at all times of the essential fact that Acme and its subcontractors were in reality the victims of vicious swindlers. The contractors themselves played a comparatively passive role

and one which gave them no reason to believe that the Government interests would be adversely affected. Any one of several defenses, all ably presented, would provide a potential ground for rejecting the claim *in toto* if one is seeking a ready disposition or is not charitable with mistakes in others. Without a mental compass fixed on a point of common sense one can easily get lost in the junglemaze of legal theory and take the wrong turning. If law is a science, as some would wish, it is one of endless imperfection, responsive to the infinite range of problems in which humans find themselves embroiled. Try as conscientiously as we will to clothe our judgments of right or wrong in broad, seemingly profound and immutable principles of law encased in glittering precedents, in the end we merely shop among the dusty books for the comforting assurance of the written word to support what our conscience has already decreed to be permissibly fair and just. An ounce of discernment is worth of pound of print.

Plaintiff is entitled to a judgment of $314,802, according to the following distribution:

Acme	$134,241
All Metals	148,724
Steel Heddle	1,814
Intricate	2,006

[fol. 99]

Pattern	2,616
Nicholson	296
Foley	3,476
Manalapan	21,629
	314,802

This may be compared with rough estimates of $292,592 for an unavailable *quantum meruit* recovery (finding 85) and $300,000 guessed by the Army Ordnance Corps to be the cost of a termination-for-convenience formula (finding 86).

* * * *

[fol. 200]

Excerpts from Findings of Fact

DAMAGES

60. *Introduction.*

(a) This is a "loss-type" contract and the measure of damages must be tailored to its peculiar requirements. In general the theory adopted hypotheses that the contract was not canceled but carried through to completion, thus involving a projection of costs as to the terminated portion. The parties are placed in the same position they would have occupied had the contract not been canceled. The method is by no means comparable to restitution of all of the claimants' unreimbursed costs, upon which theory the claimants place exclusive reliance but which is not adopted for reasons explained in the accompanying opinion. Nor is it related to a *quantum meruit* basis of recovery. The result of a computation of damages on a *quantum meruit* basis is briefly presented in finding 84 as a comparative criterion giving support to the reasonableness of the results achieved by following the adopted procedures.

(b) In the case of Acme's claim its recoverable damages will consist of the difference between its losses up to the time of cancellation and its hypothetical losses had the contract been completed (findings 61 through 70, *infra*). The logic of this approach is that by illegally canceling the contract the Government deprived Acme of the opportunity of reducing its losses by securing eventual recoupment of certain costs already invested which are not independently susceptible of direct valuation from the present record and must be ascertained through the self-executing medium of projecting the total costs of the contract through to completion. The method automatically compensates for such imponderables as Acme's costs attributable to (1) its own inefficiency and inexperience, (2) unrealistically low bid, (3) failure of its subcontractors, and (4) defective Government-furnished machines. One effect of the method is to charge Acme with the losses which it would have suffered in completing the contract, for it is tacitly recognized that Acme's unit cost of producing

rifles after cancellation would have remained at a level substantially in excess of the contract ceiling price for the rifles. This in effect benefits the Government for breach-
[fol. 201] ing the contract to the detriment of the technically innocent plaintiff, to the extent of actually unincurred but prospectively certain losses, but this is a fair price for other benefits which Acme obtains by a formula which hypothesizes contract completion.

(c) The theory underlying the measure of damages for All Metals' claim under its subcontract is that All Metals is entitled to be paid the ceiling price allowed under its subcontract after deducting the properly chargeable amounts already paid and the additional costs which it would have expended to complete the terminated portion of the subcontract (see findings 71 through 80, *infra*).

(d) To the damages for both Acme and All Metals are added their properly proven and allowable post-cancellation costs which were proximately caused by the cancellation.

(e) As to all subcontractors except All Metals the evidence is insufficient to make a computation similar to that resorted to for Acme and All Metals, so their damages will consist of those unreimbursed costs proven to be properly chargeable to performance of their subcontracts (findings 81-83).

A—ACME'S DAMAGES

61. *Costs and credits.* The following schedule lists the items and amounts which Acme claims it incurred in contract performance, the amounts thereof verified by defendant as properly chargeable to contract performance, the amounts in issue, the amounts ultimately found to be properly chargeable to the contract, the credits against the costs, and post-cancellation expenses. The columnar reference to "finding number" is the finding in which particular items are discussed. [Schedule referred to appears on page 161.]

62. *Overtime labor.* Although the record is not entirely clear as to all of the circumstances giving rise to the need for overtime labor, the plaintiff attributes it to be due to the Government's failure to make timely delivery of us-

able tooling. Since it has been found (finding 43) that only one-third of the delays can be attributed to this cause, it follows that the defendant should be charged with only one-third of the $11,186.14 which the parties agree the plaintiff expended in overtime labor, or $3,728 in round figures. The $3,728 is charged against contract [fol. 202] performance despite the plaintiff's failure to se-

Item	Claimed by plaintiff	Verified and/or claimed by defendant	In issue	As found	Finding No.
Costs					
Direct material	$440,796	$440,796	None	$440,796	
Direct labor:					
Overtime	11,186	None	$11,186	3,728	62
Straight	206,834	206,834	None	206,834	
Indirect factory expense on:					
Overtime labor @ 119.89%	13,411	None	13,411	4,470	62
Straight labor	224,110	224,110	None	224,110	
Dies, jigs, fixtures, special tools	82,264	37,359	44,905	82,264	63
Other costs	62,359	52,632	9,727	52,632	64
Total costs before G & A	1,040,960	961,731	79,229	1,014,834	
G & A (6.25%)	95,984	51,302	44,682	63,427	65
Total costs	1,136,944	1,013,033	123,911	1,078,261	
Credits					
Partial payments to plaintiff	389,310	389,310	None	389,310	66
Disposal credits	621	621	None	621	
Undelivered tools	None	6,206	6,206	6,206	
Scrap	None	1,118	1,118	1,118	
Duplicate payment	None	674	674	674	
Defective rifles	None	5,668	5,668	2,519	
Unreturned vent assemblies	None	4,760	4,760	4,760	
Liquidated damages	None	56,316	56,316	None	
Total credits	389,931	520,989	131,058	405,208	
Total costs less total credits (loss)	747,013	592,044		673,053	
Post-Cancellation Costs					
Rental of Lansdale plant	29,144	None	29,144	None	67(a)
Insurance	750	None	750	None	67(b)
Interest on V-loan	16,506	None	16,506	None	67(d)
Legal fees	15,152	None	15,152	9,597	67(e)
Maintenance	5,400	None	5,400	2,000	67(c)
Total post-cancellation costs	66,952	None		11,597	

cure advance authorization for its use as required by the contract, because defendant's illegal termination of the contract precludes its reliance on such provision. Indirect factory expense on this item of overtime is $4,470 com-

puted at the rate of 119.89 percent which the record supports. Defendant contends that indirect factory expense, if at all, should be allocated on overtime hours instead of overtime dollars, but the plaintiff is entitled to the method it customarily employs.

63. *Dies, jigs, fixtures and special tools.* It is conceded that Acme expended $82,264 on this item, but the defendant rejects all but $37,359 of it on the grounds that the latter amount was the ceiling allowance in the contract (finding 43(b), *supra*). The excess was actually expended for contract performance, however, and represents [fol. 203] an actual loss by plaintiff on this portion of the contract. This was the only completed portion of the contract, and the loss is properly includable in both the plaintiff's total loss to date of termination as well as in its contemplated loss projected to completion of the contract.

64. *Other costs.* Of $62,359 in other contract costs claimed by Acme, the defendant contests only $9,727 consisting of interest to date of contract cancellation on plaintiff's V-loan, which plaintiff claims as a direct cost chargeable to the contract in suit. Defendant has deleted the item entirely as a direct cost, and contends in the alternative that, if interest can be properly charged as a contract cost, it must be included in the plaintiff's General and Administrative expense pool for proportionate allocation to all of the plaintiff's work in progress, including the contract in suit. In accordance with preferred accounting practice the interest item of $9,727 has therefore been included in the plaintiff's General and Administrative expense for proportionate allocation to the contract, on the theory that the loan proceeds were commingled with plaintiff's other funds which were used to perform all of its work in progress.

65. *General and Administrative expense.*

(a) *Summary.* The dispute as to General and Administrative expense allocable to the contract rests on the exclusion by defendant from the expense pool of items totaling $129,663.60. A resolution of these disputes results in the following schedule:

Item	*Excluded by defendant*	*Properly includable*
Payments to Tucker, Jr.	$12,450.00	$12,450.00
Advertising	21,519.82	1,966.00
Auto expense	14,348.75	None
Travel expense	44,542.40	None
Chicago office expense	7,355.31	7,355.00
Auto depreciation	4,452.03	None
Salesmen's salaries	17,065.00	None
Selling expense	7,930.29	None
	129,663.60	21,771.00

(b) *Tucker, Jr. payments.* Since Tucker, Jr., was a *bona fide* employee whose hiring by plaintiff did not violate the covenant against contingent fees (see accompanying opinion), the payments of $12,450 made to him were [fol. 204] properly chargeable to General and Administrative expense for allocation to contract performance.

(c) *Advertising.* Of the $21,519.82 spent by Acme in general advertising, $1,966 was the cost of "help wanted" advertising in the daily newspapers. The cost of general advertising, while it may enhance the contractor's position in the commercial field, is not the type of expenditure normally chargeable to Government contracts because it aids neither in obtaining nor performing them and offers no benefit to the Government. The 1954 edition of ASPR 15.205 permits the cost of "help wanted" advertising and advertising in trade and technical journals (within certain limits) to be treated as allowable direct or indirect costs. ASPR 15.203(b), as revised March 1, 1952, permits selling expenses incurred in the marketing of the contractor's products to be charged as an indirect cost against contract performance. Although ASPR 15.205 applies only to cost-reimbursable types of contracts and then only where the regulation is incorporated in the contract by reference, it nevertheless provides a sound rule for the limitation of such costs in claims for breach of contract. The fact that on prior audits the Army Audit Agency allowed all advertising costs to be charged to the expense pool is no bar to disagreement. Thus $1,966 of the plaintiff's advertising expense is properly chargeable to General and Administrative expense for allocation to all of the plaintiff's work in progress it was designed to benefit, including the contract in suit.

(d) *Travel expense.* When Acme had travel expenses directly in connection with the contract in suit they were charged directly to the contract. Thus other travel expenses should not be charged to General and Administrative expense for apportionment to the contract in suit. The travel expenses in issue were said to cover trips made by salesmen, administrative employees and company officers which were not chargeable to any particular contract. Plaintiff failed to prove that any of these travel expenses related to the contract in suit.

(e) *Auto expense and depreciation, salesmen's salaries, selling expense.* Expenses of this type normally relate to civilian work and are to be considered to be inapplicable to Government contract work unless proven otherwise. It [fol. 205] might be speculated that a certain amount of auto expense was logically incurred in connection with the performance of plaintiff's Government contracts, but from the scanty evidence in the record it would seem that far more than a proportionate share of such expense related to the travel of salesmen, presumably in connection with promoting commercial sales. At any rate the plaintiff failed to prove that any of these expenses were applicable to Government contracts and none were analyzed sufficiently to show such application.

(f) *Chicago office expense.* Acme established an office in Chicago primarily to obtain Government contracts. Even though the contract in suit was not obtained through the Chicago office the plaintiff's admitted cost of $7,355 for the maintenance of that office is properly chargeable to plaintiff's General and Administrative expense according to recommended accounting practice.

(g) *Allocation of G & A.* The sum of $63,427.13 is properly allocable to the contract in suit from Acme's General and Administrative expense pool, computed as follows:

Total G & A expenses not subject to dispute		$202,294
Additions thereto as found herein:		
Interest on loan	$9,727	
Payments to Tucker, Jr.	12,450	
Advertising	1,966	
Chicago Office sales expenses	7,355	31,498
Total G & A expenses		233,792

The applicable rate to be applied to costs of the contract in suit to determine the allocation of G & A expense is 6.25 percent, computed by dividing the plaintiff's overall cost of performing all of the contract work on its books during the relevant 18-month period into the total G & A expense for that period $\left(\frac{\$233,792}{\$3,742,016} \right)$. Application of the 6.25 percent rate to Acme's costs for performing the contract in suit produces allowable G & A expenses of $63,427.13 (6.25 percent of $1,014,834).

66. *Credits to defendant.* The credits to defendant are listed in the schedule in finding 61, *supra.* Those credit items in dispute between the parties will be explained in the succeeding paragraphs of this finding.
[fol. 206] (a) *Undelivered tools, scrap and duplicate payment.* These credits were conceded by Acme in its requested finding 65 and in its answer to counterclaims, but omitted in the schedule of damages contained in its requested finding 57.

(b) *Defective rifles.* Defendant paid Acme $5,668 for 18 rifles delivered and rejected upon inspection, and now claims $5,668 credit[14] pursuant to the contract amendment requiring plaintiff to refund payments made for rejected rifles. Ten of the rifles were repaired by plaintiff and were in the process of assembly for resubmission to defendant when the contract was terminated. For the reasons given in *Appeal of The Douglas Corporation,* ASBCA, No. 5550, 60-1 BCA 2531, defendant is not entitled to credit for the ten rifles in the amount of $3,148.77. Information is not available as to the reasons for rejection of the other eight rifles or their condition and readiness for resubmission to defendant at time of contract cancellation, so the defendant is entitled to a credit for eight rifles in the amount of $2,519.

(c) *Unreturned vent assemblies.* Defendant loaned Acme 140 vent assemblies whose reasonable value was

---

[14] Defendant makes the motion in its requested findings to amend its second counterclaim to demand recovery of $5,667.79 for amounts paid for defective rifles. The amendment is allowed in order to conform to the proof.

$4,760, and Acme failed to return or pay for them. Defendant is entitled to credit in that amount.

(d) *Liquidated damages.* For reasons given in finding 46 and the accompanying opinion, the defendant is not entitled to a credit of $56,316 for liquidated damages which it assessed Acme for delay in deliveries.

67. *Post-cancellation costs.* Post-cancellation costs are listed in the schedule in finding 61, *supra*. The component items are the subject of the succeeding paragraphs.

(a) *Rental of Lansdale plant.* Acme leased its Lansdale plant for a four-year period commencing February 1, 1953, for the purpose of performing Government contracts in general which it hoped to obtain in addition to those which it already had been awarded. Of the $31,543.50 which plaintiff paid in rent for the plant from August 18, 1954 to December 31, 1956, it claims $29,143.50 as a post-cancellation expense allocable to the contract in suit and the remaining $2,400 as a post-cancellation expense allocable to Contract 8580. The basis of [fol. 207] plaintiff's claim is that during all of this period the Government stored in the plant various items of Government property such as machines, tools and equipment (removed in February 1955) and miscellaneous material inventory (removed in January 1957). Defendant's failure to remove its machines, tools and equipment from the Lansdale plant until February 1955 was the fault of plaintiff, which refused to permit the Government to remove such property until threat of legal action was made (see finding 53, *supra*). Plaintiff's refusal was based on its resentment at the Army's failure to pay its claim. No right to post-cancellation rental accrued to plaintiff during this period. Thereafter there remained in storage at the plant a quantity of rifle tubes and other goods in process to which the Government disclaimed ownership. After repeated requests by plaintiff the Government authorized the plaintiff to sell the material for scrap, which was done, and the proceeds were credited to the Government. Under these circumstances it would not be justifiable to charge the defendant for the complete rental of the plant for the period during which it stored this material as described, for the plant was not rented by plain-

tiff solely for the contract in suit and was not used for performance of the contract after cancellation. At best the defendant would be entitled to the reasonable storage charges for storing Government property, but it has presented no evidence as to reasonable charges for such storage. Another reason for rejection of plaintiff's rental claim is that in projecting the plaintiff's costs to complete the contract (finding 68, *infra*), allowance is included for plant rental for a period far more than ample for the plaintiff to have removed all machines, tools, equipment and termination inventory from the plant under reasonable conditions of cooperation. The Government had no obligation to guaranty contract work to plaintiff sufficient to enable plaintiff to pay the rental on the Lansdale plant throughout the period of its lease commitment.

(b) *Insurance.* Acme paid $750 in fire insurance premiums, presumably on the Government property stored in the Lansdale plant, to the end of 1956. Assuming the bulk of this cost related to insurance on the Government-owned machines, equipment and tools, rather than on the other material inventory, the need for its protection is [fol. 208] attributable to plaintiff's unjustified refusal to permit the Government to remove it from the plant. For this reason and the further reason that provisions in both Contract 1213 and 1214 would tend to preclude plaintiff from charging the defendant fire insurance premiums pertaining to the protection of Government-furnished property, there is no basis for the plaintiff to recover this item of post-cancellation expense. In its requested finding 66 the plaintiff would seem to be content with abandoning its claim for post-cancellation insurance on the Lansdale plant if the court finds (as it has in the preceding paragraph) that the claim for post-cancellation rent is not reimbursable.

(c) *Maintenance.* During the post-cancellation period until September 1954 Acme paid $5,400 to employees performing various duties at the Lansdale plant relating to termination of the contract in suit. An undisclosed portion of these duties involved the maintenance of the Government-owned machines, tools and equipment which the plaintiff had refused permission to the defendant to

remove, and, of course, such maintenance activities were self-inflicted and not reimbursable. Still other duties performed related to the taking of inventory, maintaining the condition and security of the termination inventory in storage, and possibly the finishing of certain contract work in progress. There is no way of allocating the salaries paid among the particular duties performed, nor between the contract in suit and Contract 8580 which was in a termination status simultaneously. However, it is reasonable to conclude that $2,000 of the maintenance activities could be considered as properly reimbursable post-cancellation expenses flowing proximately from the termination of the contract.

(d) *Interest.* The parties agree that subsequent to the cancellation of the contract the plaintiff paid a total of $16,506 in interest on plaintiff's V-loan which had been obtained in May 1953. The loan primarily was to finance performance of the contract, and it was secured by an assignment of contract proceeds. The proceeds of the loan had been commingled with plaintiff's other funds, including an interest-free loan of $300,000 from the National Molasses Company, Acme's affiliate, and had thus been [fol. 209] used for the plaintiff's general purposes relating to this and other contracts, without segregation. The plaintiff states in its requested findings that, after contract cancellation, the Government paid the bank under its 90 percent V-loan guaranty and thereafter plaintiff paid interest on the loan to the Government as holder of the note. No part of the record is cited in support of this requested finding and, logical as it may seem, it cannot be so found. The V-loan was eventually paid off in full to the holder thereof at some undisclosed date. The balance due on the V-loan was $109,151.13 as of August 31, 1954. As of that time the Government was withholding payments due plaintiff under the canceled contract because it was not sure as to the course it would take, i.e., whether to convert the cancellation into a termination for convenience of the Government (which it estimated would cost about $300,000), or to insist on forfeiture for statutory violations, or possibly some other solution. The plaintiff was making vigorous efforts to get the Government to release at least part of the moneys due because it was in

desperate financial circumstances. At one time the Government was considering a proposal to release $85,000 to plaintiff with the understanding that it was to be applied to the V-loan. On the basis of the amounts found due plaintiff for breach of contract (finding 70, *infra*), it is obvious that at the time of cancellation the amount owed plaintiff by defendant exceeded the balance then due on the V-loan. Circumstances in the record make it reasonable to conclude that the Government would not have released funds to the plaintiff without assurance that the funds so released would be applied to liquidation of the V-loan. Moreover, it would have been to plaintiff's interest to have applied any such receipts to payment of the V-loan, for the status of the V-loan jeopardized plaintiff's credit. It is also reasonable to conclude that plaintiff would have satisfied the V-loan prior to the interest-free loan from its corporate affiliate, the National Molasses Company. It would not be logical or equitable to allocate the $16,506 post-cancellation interest charge among all of the plaintiff's uncompleted contract work pending at the time of cancellation, for the interest in question would not [fol. 210] have accrued at all if the Government had paid plaintiff the moneys due it and thus permitted the V-loan to be fully satisfied at or shortly after the date of cancellation. For reasons given in the accompanying opinion such interest is not a properly chargeable post-cancellation expense.

(e) *Legal fees.* Following cancellation of the contract plaintiff, through its house counsel, engaged the services of outside counsel of some eminence to represent it before the Department of the Army in connection with matters arising from cancellation. Additional counsel was employed to defend suits brought by the subcontractor Manalapan based on its subcontract under the contract in suit. Plaintiff's present counsel was also employed to prosecute plaintiff's claim against the Government. In its administrative claim filed on termination forms the plaintiff claimed $26,852.13 paid to its various attorneys in legal fees allegedly incurred subsequent to cancellation of the contract. During the pendency of the suit in this court the plaintiff eliminated certain bills from its claim, leav-

ing the present claim of $15,152 for post-cancellation legal fees, as follows: Bernard Segal, Esq.—$9,134.19, C. S. Rhyne, Esq.—$918.01, and Max Mehler, Esq.—$5,099.93. All of these bills were paid by plaintiff at the recommendation of its house counsel who, with personal knowledge of the services rendered by outside counsel, considered the bills to be fair and reasonable. The three attorneys whose bills are in issue did not testify as witnesses, but plaintiff's house counsel testified to the following effect:

(1) Bernard Segal, Esq., is a prominent attorney of national repute. He and his firm rendered over 200 hours of legal services to plaintiff over a period of three years. These services related almost exclusively to the civil aspects of plaintiff's administrative claim, and the hours charged did not include the travel time spent in several trips to Washington, D.C. The services were billed at the hourly rate of $40. The minimum fee policy of the Philadelphia Bar Association at that time was $20 per hour for office work. In view of the type of services rendered and the identity of the firm rendering them, the fee of $9,134.19 is concluded to be reasonable. It is true that Mr. Segal did not testify in person and that the description of the services he rendered was supplied by plaintiff's [fol. 211] house counsel, but the fact that the latter had personal knowledge of many of the services rendered by Mr. Segal and that the plaintiff paid the bill for such services substantially suffices requirements of legal proof of reasonableness.

(2) C. S. Rhyne, Esq., is also a lawyer of national repute and a past president of the American Bar Association. Mr. Rhyne billed plaintiff for $1,386.11 for services rendered plaintiff in October and November 1954 relating to contract cancellation. The services consisted principally of telephone conversations with Government officials in plaintiff's behalf. Mr. Rhyne did not testify personally, but the nature of his services was known by plaintiff's house counsel who did testify. The record supports payment of at least $918.01 of Mr. Rhyne's total bill for services, but is silent as to the balance. $462.50 of the total bill was supported by an itemized statement reflect-

ing 8½ hours of telephone calls and a ¾ hour conference in November 1954, charged at the rate of $50 per hour. There is no itemized support for the balance of Mr. Rhyne's bills. It is concluded that the rate of $50 per hour was a reasonable charge for services of the caliber rendered, particularly in view of the fact that it was paid at that rate by plaintiff at the recommendation of its house counsel. But the record provides sufficient itemization only for $462.50 of Mr. Rhyne's services, and to this extent it is a proper post-cancellation legal expense arising from cancellation of the contract.

(3) Max Mehler, Esq., is a member of the New Jersey Bar and of good repute. Plaintiff's house counsel engaged Mr. Mehler to represent it in defending against suits brought by Manalapan in the New Jersey courts. Mr. Mehler's initial bill of $5,000, which plaintiff's house counsel considered to be fair and reasonable, was voluntarily reduced to $3,500 at plaintiff's request, and paid. For subsequent services Mr. Mehler billed and was paid $1,500 by plaintiff. Mr. Mehler did not testify as a witness. Plaintiff's house counsel, who had considerable personal knowledge of the services rendered by Mr. Mehler, considered the amounts charged to be fair and reason-
[fol. 212] able. However, it cannot be determined to what extent the suits brought by Manalapan against plaintiff were proximately caused by defendant's cancellation of the contract in suit, or by causes which existed independently of the cancellation. Therefore, while plaintiff paid Mr. Mehler fees and expenses totaling $5,099.93, they cannot be considered as properly proven post-cancellation legal expenses attributable to contract cancellation.

(4) Plaintiff's reimbursable post-cancellation legal fees total $9,597.

(f) *Total.* Acme's post-cancellation costs proximately caused by cancellation of the contract totaled $11,597.

68. *Projected cost to complete.* Following cancellation of the contract the defendant made a detailed projection of the expenses necessary to complete the contract. This projection resulted in an estimated $671,423 in costs to perform the terminated portion of the contract alone. The projection was conservatively computed, reflected the

total costs to complete with reasonable accuracy, considered expenses on all rifles and spare parts to be completed as well as inventory and work in process on hand from plaintiff's own books and records, and was not effectively countered by plaintiff. The projection disclosed that plaintiff had incurred 62 percent of its expenses prior to contract cancellation, that the remaining 38 percent of total costs would be spent in delivering the undelivered 1,568 rifles and spare parts, and that the average cost of each undelivered rifle would be $428.20. This cost of $428.20 compares with the $1,179.29 average unit cost of each of the first 446 rifles delivered under the contract, and with the plaintiff's estimate for price redetermination purposes that each of the remaining 2,305 rifles would cost an average of $453.31 to produce. It also compares with a subsequent study by plaintiff revealing that during the last six months of its production the plaintiff's average cost of producing each rifle was $690.21 (finding 52, *supra*).

69. *Loss on projected completion.* Based on data in findings 61 and 68, had Acme completed the contract its [fol. 213] losses (exclusive of its subcontractors) would have amounted to $550,409, computed as follows:

Cost of completed portion		$1,078,261
Projected cost to complete		671,423
Total costs, actual and projected		1,749,684
Less:		
Contract ceiling price	$1,191,077	
Allowable overtime, including indirect factory expense	8,198	1,199,275
Overall loss if contract completed		550,409

70. *Computation of Acme's recoverable damages.* The method of measuring Acme's recoverable damages for breach of contract is described in finding 60, *supra*, to be its justified post-cancellation expenses proximately caused by the cancellation, plus the excess of (1) its loss on the completed portion of the contract over (2) any lesser amount of its overall loss had the contract proceeded to completion, on the theory that illegal cancellation of the contract deprived the plaintiff of the opportunity to cut

its losses. Thus, Acme's recoverable damages, exclusive of its subcontractors, amounted to $134,241, computed as follows:

Post-cancellation costs			$11,597
Loss on completed portion		$673,053	
Less: Reconstructed loss on completion of contract		550,409	122,644
Damages			134,241

* * * *

[fol. 224]

* * * *

D—RECAPITULATION OF DAMAGES

84. *Schedule.* The following schedule recapitulates the damages found due Acme and its subcontractors in findings 60 through 82:

Acme			
Post-cancellation costs		$11,597	
Loss on completed portion	$673,053		
Reconstructed loss on completion	550,409	122,644	$134,241
All Metals			
Post-cancellation costs		3,945	
Due under subcontract		130,632	
Canton subcontract		10,434	
Edgewater subcontract		3,713	148,724
Other subcontractors			
Steel Heddle		1,814	
Intricate		2,006	
Pattern		2,616	
Nicholson		296	
Foley		3,476	
Manalapan		21,629	31,837
Total judgment			314,802

E—COMPARATIVE CRITERIA

85. *Quantum Meruit.* The reasonable value of plaintiff's performance to the defendant up to the time of contract cancellation is $697,800. This is equivalent to a unit price of $600 per gun[16] delivered and compares with the range of bids submitted on Contract 1213 (see finding

[16] This is a rough and not a studied conclusion. It conflicts radically with evidence offered by defendant.

7, *supra*). It is substantially higher than the unit price of similar guns manufactured for the Government contemporaneously by an established producer under several prior contracts with the Government. Much of the difference is compensated for by the fact that in letting the contract to a manufacturer with no prior experience in [fol. 225] this line the Government derived the prospective advantage of broadening the base of procurement, and it was not unnatural to expect a higher initial cost. In addition, had the Government not decided that it had no further military requirements for the rifle, it may have derived additional advantage from the work in process but incomplete at the time of cancellation. Assuming the reasonable value of plaintiff's performance to time of cancellation to be $697,800, the reduction of such value by credits paid plaintiff totaling $405,208 would produce a net recovery of $292,592 on a basis of *quantum meruit*, as compared with the recovery of $314,802 on the basis adopted in findings 60 through 85 (which includes $15,542 in post-cancellation costs).

86. *Termination for convenience.* As stated in finding 48, *supra*, at the time of cancellation the Ordnance Corps made a rough estimate that termination of the contract for convenience of the Government would cost about $300,000. The basis of such estimate is not known, and the record before the court is not sufficient for a computation of termination costs.

RECOMMENDATION FOR CONCLUSION OF LAW

It is recommended that the court adopt the following conclusion of law:

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff, Acme Process Equipment Company, to its own use and for the use and benefit of certain subcontractors, is entitled to receive of and from the United States and judgment is therefore entered for the plaintiff in the amount of three hundred fourteen thousand, eight hundred and two dollars ($314,802).

Respectfully submitted,

C. MURRAY BERNHART,
Commissioner.

[fol. 226]

IN THE UNITED STATES COURT OF CLAIMS

No. 349-57

ACME PROCESS EQUIPMENT CO., TO ITS OWN USE, AND FOR THE USE AND BENEFIT OF NICHOLSON PRODUCTS COMPANY, STEEL HEDDLE MANUFACTURING CO., FOLEY MACHINE COMPANY, PATTERN MACHINE & FOUNDRY CORPORATION, INTRICATE MANUFACTURING COMPANY, JAIMIE KOHAN, D/B/A MANALAPAN MACHINE & WELDING WORKS, AND PITTSBURGH NATIONAL BANK, SUCCESSOR TO PEOPLE'S FIRST NATIONAL BANK & TRUST COMPANY, ASSIGNEE OF ALL METALS INDUSTRIES, INC. v. THE UNITED STATES

Jack Rephan for the plaintiff. *Solomon Dimond* and *George E. Palmer* of counsel.

James F. Merow, with whom was *Assistant Attorney General John W. Douglas*, for the defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

OPINION—June 11, 1965

DAVIS, *Judge*, delivered the opinion of the court:[1]

Plaintiff's first experience as a defense contractor was to bid on and win two negotiated Ordnance Corps con- [fol. 227] tracts, both of which soured into litgation.[2] In January 1953, Army Ordnance awarded a contract for

[1] The opinions and findings of Commissioner C. Murray Bernhardt in this case and its companion, *Acme Process Equipment Co. v. United States*, Ct. Cl., No. 538-59, decided this day, have been most helpful. The court has borrowed material from both opinions, although, in some respects, our results are different.

[2] No. 538-59, *supra*, fn. 1, involves the other contract.

the manufacture of 75 mm. recoilless rifles. This project was largely subcontracted, leaving for Acme only the final finishing and assembly of components, and the earlier job of fashioning the rifle barrels from rough forgings with machines furnished by the Government under a separate facilities contract. From the start, Acme was beset by serious production delays due to a combination of causes, among them its own inexperience, defaults by subcontractors, and defects in some of the government-furnished machines. Generous time extensions forgave many delinquent deliveries, but liquidated damages were assessed on others. After uncovering alleged violations of statutes relating to kickbacks, contingent fees, and conflicts of interest, Ordnance suspended work under the contract in July 1954 and canceled it two months later in August 1954. The purported infractions involved a clique of unprincipled employees of Acme, aligned with a stockholding minor executive of the corporation. In this suit for breach of contract Acme denies any violations and alleges that the charges of malfeasance were a smokescreen to enable the Government to cancel without cost a contract for the production of obsolete weapons no longer needed. In that manner, it is said, defendant hoped to avoid the heavy cost of a termination for its own convenience. Cancellation left Acme financially crippled, since it was unreimbursed for much of its large investment in contract performance. Plaintiff spent years in fruitless but nearly successful efforts to obtain settlement.

The Government's major defense still is that Acme is entitled to no recovery because it violated certain statutes and covenants (concerning contingent fees, kickbacks, false claims, and conflicts of interest). Should each of these absolute defenses be rejected, the plaintiff has requested us to grant recovery based on the theory of restitution, rather than the traditional remedy of damages usually awarded by this court. In addition to its objection to this form of relief, the Government asserts a partial defense based on plaintiff's lack of standing to sue on behalf of its subcontractors. The defendant also argues [fol. 228] that, since plaintiff itself was responsible for delays, it is not entitled to recover delay-damages, and

the contracting officer's assessment of liquidated damages was proper. Finally, Acme urges its right to interest on amounts due, on the ground that the Government's actions constituted a taking within the Fifth Amendment. We consider each of these aspects of the case.[3]

I. CANCELLATION

A. COVENANT AGAINST CONTINGENT FEES

The defendant contends that it validly canceled the contract in the summer of 1954 because (1) Acme misrepresented and concealed its employment of a part-time agent to secure government contracts; and (2) such an arrangement violated the covenant against contingent fees.

For many years prior to the events with which we are concerned, Acme enjoyed some prestige as a manufacturer of processing tanks, boilers, containers, and related equipment for the distillery, brewery, and sugar industries—a predominantly civilian market. In 1952 it sought to enter the field of government procurement to provide a cushion against the fluctuations of its commercial sales, particularly in periods of war-born material shortages. Lacking expertise in this prospective market, plaintiff engaged, in the early fall of 1952, the services of Harry K. Tucker, Jr., and James S. Norris, who represented accurately that they were experienced in government procurement procedures, but concealed their dishonorable intentions to victimize their employer. At first, the team was paid under an informal arrangement providing for commissions on sales and a minimum salary guarantee. On October 13, 1952, Tucker entered into an express one-year contract with Acme, whereby he and/or his "organization" agreed to serve as a "bona fide sales agent" on a part-time basis.[4]

---

[3] This case, like No. 538-59, was tried and the Commissioner's report filed before the decision of the Supreme Court in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963). Neither party has preserved an objection to the receipt of *de novo* evidence, and we therefore need not concern ourself with that problem. *Stein Bros. Mfg. Co.* v. *United States*, Ct. Cl., No. 389-59, decided July 12, 1963, 337 F. 2d 861, and succeeding decisions in that line.

[4] It is impossible to ascertain whether the written contract superseded the prior informal agreement.

[fol. 229] Under the agreement, Tucker was to be paid a weekly minimum salary of $150, which would be increased to five percent of his weekly gross sales up to $10,000 (*i.e.*, sales by Acme under contracts obtained through him), plus three percent of such weekly gross sales in excess of $10,000. Minimum salaries paid prior to any sales by Tucker were to be deducted, later, from the excess of his commissions over his minimum weekly guarantee. The result was that the guaranteed weekly salary was a nonrecoverable advance against commissions; Acme could, however, cancel the contract if commissions failed to cover the minimum salary guarantee. Norris and Tucker also entered into an agreement with each other that Norris would receive fifty percent of any fees paid Tucker by his other clients for enabling them to obtain subcontracts from Acme. Plaintiff was unaware of this latter arrangement.

Tucker shortly produced a deluge of inquiries, bid proposals, and invitations from both commercial and government sources. Among these were the invitations to bid on the contract at bar (Contract 1213), as well as the agreement (Contract 8580) which is the subject matter of the other suit, No. 538-59.

On October 23, 1952, Acme submitted its original bid for Contract 1213 to the Philadelphia Ordnance District. The bid form contained a provision requiring the contractor to represent whether it had or had not (boxes were supplied after each of the alternatives for inserting a mark to denote the correct fact) "employed or retained a company or person (other than a full time employee) to solicit or secure this contract." In its October 23rd bid, James S. Norris, as "General Manager of the Defense Work Department," certified that plaintiff had *not* retained such a person. Under a revised proposal, dated December 10, 1952, and also signed by Norris, plaintiff made a directly contrary representation. On December 18, 1952, however, Acme once again reversed its position. Joshua Epstein, president of Acme, executed a government form entitled "Contractor's Statement of Contingent or Other Fees", in which he, either accidentally or deliberately, filled in one of the two alternative boxes to indi-

cate that Acme had not retained a part-time employee to secure the contract. This representation was incorrect, [fol. 230] since plaintiff had, in early October, hired Tucker on a part-time basis to solicit government contracts.

We assume, for this part of the case, that these misrepresentations, or the substance of the Acme-Tucker contingent fee arrangement, or both, breached the contract. But the crucial point is that the defendant, after obtaining knowledge of the facts, waited until over a year later before canceling the agreement. Could an election to cancel be delayed for such a time? We hold not. In our view, an election to annul the contract had to be made with reasonable promptness after the Government gained knowledge of the facts; by putting off its decision for an inordinately long period, the defendant lost the right it earlier had to terminate the contract without incurring any cost.[5]

As early as May 1953, the Philadelphia Ordnance District had sufficient information to determine whether Acme had previously made any misrepresentations relating to contingent fees or had violated the covenant. In June 1953, defendant nevertheless issued a supplemental agreement, which increased the number of rifles to be manufactured under the contract from 2,322 to 2,751 (an 18% increment). Despite the production difficulties it encountered, plaintiff continued manufacturing the rifles until Ordnance directed it to suspend all work under the contract on July 22, 1954. Cancellation for unspecified "statutory violations" followed on August 18, 1954.

This phase of the case—as distinguished from the Government's responsibility to reimburse Acme for payments to Tucker in violation of the covenant against contingent fees—is governed by the rule that, "[W]here a contract is breached in the course of its performance, the injured party has a choice presented to him of continuing the contract or of refusing to go on. If he chooses to con-

---

[5] In both this case and its companion, we also reach the different question whether the Government can validly refuse to reimburse the plaintiff for payments made to Tucker.

tinue performance he has doubtless lost his right to stop performance * * *." 5 Williston, *Contracts* § 683 (3d ed. 1961) (footnotes omitted); *e.g.*, *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F. 2d 915, 929-30 (C.A. 1), *cert. denied*, 364 U.S. 911 (1960); *Lichter* v. *Goss*, 232 F.2d 715, 720 (C.A. 7, 1956). After discovering the [fol. 231] contingent-fee violations, defendant could not wait for over a year to decide whether it wished to annul the contract as a whole, on that basis. The sanction of contract cancellation is too drastic to permit a long delay. Beyond the time reasonably necessary to determine if there has been a misrepresentation or a violation of the covenant,[6] the defendant cannot allow an unwary contractor to continue performance and thus incur large expenses, all of which the Government will refuse to reimburse if and when it decides to cancel the contract on the ground of the violation. As this court said in *Companhia Atlantica* v. *United States*, 148 Ct. Cl. 71, 78, 180 F. Supp. 342, 347, *cert. denied*, 364 U.S. 862 (1960), "it would be a great wrong to permit the Government to awaken such a 'sleeper' to justify its cancellation * * *." In that case, the plaintiff had fully apprised the defendant of the contingent fee arrangement at the outset of negotiations, which lasted over a year. The Government then canceled its contract for the purchase of tungsten from the plaintiff less than two months after the agreement had been signed, and later sought to defend its action on the grounds that the covenant against contingent fees had been violated. Although the court found that there was no violation, it also based its decision on the alternative ground that the defendant had waited too long before annulling the contract. Here, too, we refuse "to awaken such a 'sleeper'."

---

[6] We take into account, in establishing what was a reasonable time for determining whether the covenant against contingent fees was violated, the fact that an evaluation of all the circumstances surrounding the arrangement is often necessary. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538-59, slip op., pp. 12-16, 19, decided this day. But, as pointed out *infra*, the fourteen months which the Government waited before canceling Contract 1213 was an unreasonable delay even by lenient standards.

The severity of contract cancellation makes the present case, in this aspect, wholly unlike one in which the Government simply attempts to recover or withhold funds paid in violation of the covenant against contingent fees. That type of action is governed by the principle that, where government officials have erroneously or illegally paid out money, mere delay in seeking its recovery will not preclude a suit by the United States. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538-59, slip op. pp. 17-19, decided this day. But when the Government *cancels* an entire contract because of a breach [fol. 232] of the covenant, it can refuse to reimburse the contractor, not only for wrongful or illegal expenditures, but also for amounts to which the contractor would otherwise be legally entitled. To avert extreme hardship, we think that the Government is obliged to take such a course within a reasonable time after it has discovered the breach.[7]

---

[7] There are situations in which the Government can cancel a contract notwithstanding the amount of time elapsing between discovery of the violation and termination of the contract. Such cases, however, involve more than a plain material breach of the contract, as is the case here. See *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), in which the Supreme Court held that a government contract for the construction and operation of a power plant was unenforceable, on the ground that a federal conflict-of-interest statute, 62 Stat. 703, 18 U.S.C. § 434, had been violated in securing the contract. That *penal* provision "speaks in broad, absolute terms," establishing "a rigid rule of conduct" (364 U.S. at 550, 551), and its violation may result in imprisonment for up to two years and/or the imposition of a fine not to exceed $2,000.

The only legislation with which we are now concerned is the Armed Services Procurement Act of 1947, § 4, 62 Stat. 21, 23, 10 U.S.C. § 2306(b), which is not a penal statute. It requires that a covenant against contingent fees be inserted in contracts such as plaintiff's and states that, in the event that the covenant is breached, the Government *may* (*i.e.*, in its discretion) either deduct the commission from the total contract price *or* annul the contract. Congress gave the defendant a choice, and did not require the voiding of the contract. The violation of the covenant against contingent fees in this case was thus not conduct that was illegal *per se*, as in *Mississippi Valley Generating Co.* It was a contractual breach, which the defendant could, under the statute, elect to ignore. Our holding today is that, under that statute, the election to annul could not be unreasonably delayed.

The defendant does not seem to question that an unconscionable delay in raising a misrepresentation or a violation of the covenant against contingent fees as a ground for annulment will preclude the Government from thereafter urging that defense. It contends instead that there was no unreasonable delay, because the Government did not discover all the material facts until shortly before the actual cancellation. The evidence fails to bear out this argument.

In connection with its other major government contract ("8580"), Acme correctly represented, on November 4, 1952, in the bid which it submitted to Rock Island Arsenal that it had employed a part-time agent to obtain the contract. On or about December 12, 1952, Rock Island received from plaintiff a formal "Contractor's Statement of Contingent or Other Fees," to which was attached a copy of Acme's employment contract with Tucker dated October 13, 1952. Contract 8580 was awarded to plaintiff by Rock Island on January 8, 1953, but was administered by the Philadelphia Ordnance District, the same [fol. 233] agency which handled present Contract 1213 from its inception. Thus, even prior to the award of Contract 1213 to Acme on January 27, 1953, the contracting Ordnance District had access to the Tucker employment agreement, which was physically incorporated in the Contract 8580 file, although the District had no particular reason to refer to that part of the file.[8]

On May 18, 1953, the Ordnance District was again told of the agreement between Acme and Tucker. Plaintiff informed representatives of the Ordnance District that Tucker had been a full-time employee since January 1953, that his original part-time contract on a commission basis had been ended, and that he had received no commissions under the prior agreement. The letter also referred to the contingent-fee statement previously filed with the Rock Island Arsenal and asked that it be withdrawn.[9]

---

[8] Plaintiff seeks to impute knowledge of the Tucker contract to the Ordnance District as of January 1953, but we see no basis for such an imputation.

[9] The May 18, 1953, notification included one incorrect statement. The letter said that Tucker had been a full-time employee since

See finding 8(f). The defendant was thus told that (1) at the time that the plaintiff made its bid and negotiated for Contract 1213, it had in its employ a part-time agent whom it had hired to solicit government contracts; and (2) that agent was Harry K. Tucker, Jr., who, along with his father, had been under surveillance by the Government for suspected statutory violations in connection with prior contingent fee arrangements. Finding 3. Furthermore, by referring back to the bid and the related forms which Acme submitted to Ordnance in connection with Contract 1213 (and to which Acme specifically referred), the Philadelphia Ordnance District could easily have discovered the prior misrepresentations. Yet the defendant waited for fourteen months before canceling the contract. During this period the plaintiff continued to perform and to incur expense.

The Government seeks also to justify the delay on the ground that it was not told *all* the relevant facts until shortly before it canceled. It emphasizes an alleged informal agreement between Tucker and plaintiff's presi- [fol. 234] dent, entered into when he first began working for Acme in the fall of 1952. Under that agreement, Tucker was to receive a three percent commission, which he agreed to share equally with Norris. But the only evidence in the record of this arrangement is a written statement made by a General Accounting Office investigator in June 1955, on the basis of an interview with Joshua Epstein, Acme's president. Even if we accept at full value this second-hand statement made three years after the events, there is no way of knowing whether the alleged informal agreement was superseded by Tucker's written contract. If that was the case—which it might well have been—this commission-splitting agreement lasted no more than two weeks. In this state of the proof we cannot give any significance to this alleged side-agreement. Other than the information referred to in footnote 9, *supra*, this is the only "fact" which the Government can point to as remaining undisclosed after May

---

January 1953, whereas the contract under which he began working full-time was not effective until March 1953. However, this error did not conceal the existence of the contingent-fee relationship.

1953. We do not hesitate, therefore, to conclude that the defendant had sufficiently full knowledge of the contingent-fee arrangement as of May 1953, and could not delay until July 1954 to elect on that ground to exercise the drastic remedy of complete cancellation.[10]

B. ANTI-KICKBACK ACT

The Tucker organization victimized Acme chiefly through the receipt of illegal kickbacks. Unknown to plaintiff, various small manufacturers in the metals field had service contracts with Tucker similar to the one he had with Acme. Under those agreements, Tucker received a minimum weekly guarantee, as well as commissions for obtaining contracts. When plaintiff, through Tucker and Norris, let subcontracts to secret clients of the two conspirators, each subcontract necessarily contained an amount to cover the fee paid to Tucker and shared by Norris. Since the pair not only prepared Acme's government contract bids, but also negotiated all its related subcontracts, they were in a splendid position to mulct their employer.

[fol. 235] The subcontract let to All Metal Industries, Inc. is the most flagrant example of the Tucker-Norris extortion scheme. More is involved than the secret commissions which the two received from All Metals for enabling it to secure subcontracts from the plaintiff. In addition, Tucker, Norris, and Jack Epstein, who was a plant superintendent and minor stockholder of Acme,[11]

---

[10] As pointed out in the opinion in the other *Acme* case, No. 538–59, the facts known to defendant by the Spring of 1953 were sufficient to call for an election at that time to use the severe remedy of total cancellation, but the Government's delay after these facts were known was not sufficient to constitute an affirmative waiver of the defendant's conventional right to refuse to reimburse Acme for its illegal payments to Tucker. There is no inconsistency.

[11] Jack Epstein was the son of Joshua Epstein, president of Acme. There is no evidence, however, that Joshua Epstein knew anything out the kickbacks which Tucker and Norris were receiving from subcontractors or the extortion scheme they carried out with his son. Nor is there persuasive evidence that any Acme employee or official other than the conspirators was aware of these illicit activities.

forced All Metals to agree to pay $23,500 to them through Gunn Engineering Company, a dummy corporation. It was understood that All Metals would pass this cost on to Acme by including it in the subcontract price. All Metals actually paid $12,000 to Gunn under the agreement. When the conspirators later became fearful of exposure, they attempted to expunge all evidence of the transaction from the subcontractor's books. Through an oversight, however, they left in the cost-structure of All Metals' ultimate subcontract price to Acme the $12,000 already paid to Gunn Engineering Company (although this sum was more than offset by Tucker's waiver of certain commissions which All Metals owed him). Even after All Metals decreased its ultimate price to less than that contemplated prior to the extortion scheme, the reduced price still reflected some portion of the combined fees which All Metals had paid or agreed to pay to Tucker and Gunn. Bookkeeping technicalities tend to obscure this fact, but, in the final analysis, had Contract 1213 been of a cost-reimbursable nature, the Government would ultimately have borne part of the cost of the kickbacks. See findings 20 and 21.

The arrangements between Tucker and other firms for which he obtained subcontracts from Acme were less complex, but hardly less reprehensible. For instance, Manalapan hired Tucker in November 1952 and agreed to pay him $100 weekly as a nonrecoverable advance against commissions. As a result, Manalapan obtained a series of small purchase orders from Acme under Contract 1213 from February through July 1953. The subcontract prices [fol. 236] hid the $1,350 in commissions and/or salaries which Manalapan paid Tucker and which Tucker shared with Norris. The conspirators entered into comparable agreements with several other subcontractors. See findings 18-25. These subcontractors knew or should have known that Tucker was Acme's agent, but the responsible officials of Acme were not aware of the double agency.[12]

---

[12] Citing *Carrier Corp.* v. *United States*, Ct. Cl., No. 346–59, decided Feb. 14, 1964, 328 F. 2d 328, the Government claims that the wrongdoers were given broad apparent authority by the plaintiff, and that Acme is therefore bound by their acts. Even if the premise

In these circumstances, the defendant claims that Acme violated the Anti-Kickback Act, 60 Stat. 37, as amended, 41 U.S.C. § 51, and that that violation authorized the Government to cancel the contract. The Anti-Kickback Act, first enacted in 1946, was significantly amended in 1960. 74 Stat. 740. Both versions retroactively prohibit the payment of any compensation or gratuity by a subcontractor to an agent, employer, or official of a higher tier subcontractor or a prime contractor with the United States. By the terms of the statute, such compensation is conclusively presumed to be included in the price ultimately paid by the Government, and the United States may bring a civil action against the prime contractor, subcontractor, or the agent to recover that amount. Along with this civil remedy, the statute provides criminal penalties against persons knowlingly making or receiving prohibited payments. Under the 1946 Act, coverage is limited to government contracts on a "cost-plus-a-fixed-fee or other cost reimbursable basis." [13]

---

is true, the conclusion does not follow. Imputation of an agent's actions to his principal is precluded where the agent's action is taken for the purpose of defrauding the principal. 3 Fletcher, *Private Corporations* § 826 (rev. ed. 1947); *e.g., Maryland Casualty Co.* v. *Tulsa Industrial Loan & Investment Co.*, 83 F. 2d 14, 16–17 (C.A. 10, 1936). Since the commissions which the Tucker organization received from subcontractors increased their charges to Acme, plaintiff was being swindled by its own agents.

[13] The statute, as originally enacted in 1946, provided: "[T]he payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as hereinafter defined, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is hereby prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or

[fol. 237] Tucker, Norris, and Jack Epstein were indicted for violation of the Anti-Kickback Act and brought to trial in the United States District Court for the Eastern District of Pennsylvania. After presentation of the Government's case, in April 1956, a defense motion for acquittal was granted on the ground that the statute did not apply to this type of contract. The district judge felt that a negotiated fixed-price contract, with a price redetermination provision permitting a retrospective or prospective increase within a narrow range, was not a cost-reimbursable contract within the meaning of the Act. The court made scathing comments as to the conduct of the accused, observed that Acme had been victimized, and recommended legislation to amend the statute to apply to this situation. Because of the uncertainty with regard to the coverage of the 1946 Act, the Comptroller General thereafter recommended to Congress that it be revised. In the Act of September 2, 1960, an amendment was adopted which retroactively broadened the coverage of the statute to include all negotiated contracts (defined to

---

hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or cost reimbursable contract, or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor."

mean all contracts made without formal advertising). No other essential change was made. 74 Stat. 740, 41 U.S.C. § 51.

The Government first claims that it was entitled to cancel Contract 1213 for violation of the original Anti-Kickback Act. It asserts that when Congress, in 1946, provided a civil remedy entitling the Government to recover [fol. 238] the amount of the kickback, it did not intend to alter the pre-existing common law remedy of contract cancellation. The major stumbling block is the absence, so far as we know, of any decision or comment in support of the proposition that there was such a remedy at common law. In fact, the House Report on the 1946 Act states, "There is no existing statutory or other authority of law under which it may be said that the United States clearly has a right to recover the amounts of any such fees or gratuities." H.R. Rept. No. 212, 79th Cong., 1st Sess. 2 (1945). *A fortiori*, it is highly doubtful that there was any pre-existing right of the Government to cancel the entire contract of a prime contractor whose agents received improper kickbacks of which he was unaware.

In its effort to invoke a forfeiture, the most drastic civil penalty known to common law, the Government has cited only sparse collateral support. There are statements in *United States* v. *Davio*, 136 F. Supp. 423, 428 (E.D. Mich., 1955), that the Anti-Kickback Act codified the prior common law remedy. But that suit was for the recovery of amounts paid as kickbacks. Nowhere does the court hint that the *Government* had a pre-existing right of contract cancellation in the present circumstances.[14] Whether it was codifying an existing right or

---

[14] It is of course clear that "a person who knows that another has employed an agent to conduct a transaction with him is subject to liability to the other for secretly employing the [agent] to act on his account in the transaction. * * * The defrauded principal can rescind the transaction with the other principal * * *." Restatement, Agency 2d § 391, Comment "g". That principle would have enabled Acme to cancel its agreements with the subcontractors, but it could not give the defendant a right to cancel its contract with Acme. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538–59, decided this day, slip. op., p. 20, *et seq.*

creating a new one, Congress, when it enacted the 1946 legislation, gave the Government only one civil remedy against contractors whose agents had received secret kickbacks. Had the legislature wished to provide the additional remedy of contract annulment, it could have done so. *Cf.* Armed Services Procurement Act of 1947, § 4, 62 Stat. 21, 23, 10 U.S.C. § 2306(b). In the absence of any statutory indication that the Government has a right to cancel the contract in this situation, it is not for the court to engraft a new and drastic remedy onto the Anti-Kickback Act. *Cf. Unexcelled Chemical Corp.* v. *United States*, 137 Ct. Cl. 681, 684, 149 F.Supp. 383, 385 (1957). [fol. 239] Furthermore, we have grave doubts about the applicability of the 1946 Act to the present contract. If it is not applicable, the Government's position must be rejected for the additional reason that in 1953 and 1954 there was no recognized federal public policy invalidating Contract 1213. *Cf. Muschany* v. *United States*, 324 U.S. 49, 66-67 (1945).[15] If the 1960 anti-kickback legislation was the first provision covering Contract 1213, the improper actions which took place in 1953 hardly contravened "long government practice or statutory enactments." [16] When Acme's agents received kickbacks about which plaintiff had no knowledge, it can scarcely be said that *plaintiff* (as distinguished from the agents) violated "obvious ethical or moral standards", and that its con-

---

[15] "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a *plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards*, this Court should not assume to declare contracts of the War Department contrary to public policy. The courts must be content to await legislative action." (Emphasis added.)

[16] Like its predecessor, the 1960 statute was given retroactive effect, and thus might conceivably by a "statutory enactment" on the basis of which the contract could be canceled. This would result, however, in the use of legislation enacted in 1960 to condemn conduct taking place in 1953–1954, and to justify a forfeiture. We think the Court in the *Muschany* case was referring to "statutory enactments" *in esse*.

tract with the defendant could therefore be canceled on that ground.

The unreported district court decision granting the motion for acquittal of Tucker, Norris, and Jack Epstein is, of course, a direct holding that the 1946 anti-kickback legislation did not cover the present contract.[17] One of the primary reasons behind the enactment of the 1960 amendment was to remove serious doubt that fixed-price contracts with redetermination clauses were included in the act's coverage. See S. Rep. No. 1585, 86th Cong., 2d Sess. 2-6 (1960). While the Tenth Circuit has held that the 1946 Act covers certain contracts having price-determination provisions, it emphasized that the contract with which it was dealing had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward." *United States* v. *Barnard*, 255 F.2d 583, 588 (C.A. 10), *cert. denied*, 358 U.S. 919 (1958). Acme's [fol. 240] contract, however, had a limited range of upward revision. See finding 15. The applicability of the 1946 Act to Contract 1213 is thus highly questionable.

For these reasons, the present case is not like *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). There, the dual agent violated a federal conflict-of-interest statute, 62 Stat. 703, 18 U.S.C. § 434, in the negotiation of a contract entered into with the United States. Unlike our case, the statutory provision which the agent violated was undoubtedly on the books at the time of the misconduct. Also, the statute itself provided no more than a criminal sanction. Had the Supreme Court refused to imply a civil remedy, "the public [would] be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent." 364 U.S. at 563. Here, the civil remedy established by the statute enables the Government to recover any amounts it has paid out as a result of kickbacks; the public does not bear any part of the expenses illegally

---

[17] The district court decision in the criminal case does not collaterally estop the Government from asserting the applicability of the 1954 Anti-Kickback Act to the present contract. See *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 492–94 (1950).

incurred. And most significantly, the violation in *Mississippi Valley Generating Co.* affected the validity of the entire transaction. In the negotiations preceding the contract, the Government was represented by a consultant who was, at the same time, associated with an investment banking company which stood to profit if the plaintiff was awarded the contract. The contract was the result of these tainted negotiations. In addition, the plaintiff itself was not altogether innocent, since it was well aware of the possible conflict of interest. 364 U.S. at 565 n.19. The kickbacks with which we are concerned, however, were in no way related to the negotiation and execution of Contract 1213, and do not affect its validity. They were separate transactions made without the knowledge of the plaintiff, which certainly had nothing to gain by these secret dealings. The principles of *Mississippi Valley Generating Co.* do not require or suggest that the contract at bar could or should be canceled because of the secret receipt by Tucker-Norris of kickbacks from subcontractors.[18]

[fol. 241]

C. CONFLICT-OF-INTEREST STATUTES

Defendant urges that Acme's employment of Harold J. Lee and Charles G. Hochstuhl contravened certain provisions of the federal conflict-of-interest statutes, thereby making the contract voidable by the Government.

In the early stages of contract performance Acme was experiencing production problems with machines and tooling supplied by the Government under a companion facilities contract. At plaintiff's request Watervliet Arsenal ordered Harold J. Lee, a machinist lead foreman at the

---

[18] The defendant urges that a ruling against cancellation will render it impossible for the Government to annul an agreement with a prime contractor after discovering that its agents have secret kickback arrangements with its subcontractors. We see no such consequence. If the defendant wishes to provide itself with that remedy, it may do so by inserting a "covenant against kickbacks" (similar to the covenant against contingent fees) in all its contracts. And the Anti-Kickback Act may be amended to provide that special relief, if it is desirable.

Arsenal, to report to Acme's Lansdale plant to assist plaintiff in its technical problems. Under his official orders Lee worked at Acme's plant from his arrival on April 20 until April 24, 1953, at government expense. The Arsenal refused Acme's request that it loan Lee's services for an additional week at government expense. Instead, Lee was given official permission to remain at the plant, advising plaintiff in an absent-without-pay status from April 27 to May 1, 1953. During this latter period he worked 96 hours, for which Acme paid him $5 per hour plus hotel expenses (compared to his government salary rate of $2.60 per hour). The amounts paid by Acme to Lee were charged against Contract 1213. Plaintiff was pleased with Lee's services and commended him to Watervliet Arsenal. Upon his return Lee filed with the Arsenal a trip report, which described the production problems he had observed and the advice he had given Acme personnel for their solution. In large part the report reflects the inexperience of Acme's personnel and their lack of necessary equipment. There is no evidence of any improper conduct on the part of plaintiff or of Lee—aside from the propriety of his being hired at all. The defendant concedes that Lee's employment by plaintiff did not affect his impartiality, a fact which is evident from the contents of his report and the effect of his testimony as a witness at the trial of this case.

[fol. 242] A federal statute precluded any "employee of the United States or any department or agency thereof" from receiving "any compensation for any services rendered * * * in relation to any * * * contract * * * in which the United States is a party." 62 Stat. 697.[19] During the week he received a salary from Acme, Lee

---

[19] The conflict-of-interest provisions allegedly violated have since been superseded by Public Law 87–849 (76 Stat. 1119, 18 U.S.C. §§ 201 et seq.), enacted October 23, 1962, an amnibus exposition and revision of all statutes in the field of conflict-of-interest, bribery and graft relating to government employment. Since the acts complained of occurred prior to the omnibus measure they must be tested against the law then extant, but useful information on the purpose of the superseded statutes is available from the legislative background and content of the latest compendium.

was not on the Government's payroll at all. We are not concerned with the undercover activities of an employee who pretends to be working for the Government while secretly performing services for a contractor. During that week, Lee received a reasonable salary from plaintiff and performed valuable services about which the defendant was fully informed. It may well have been poor judgment for Acme to hire, or the defendant to permit the hiring of, Lee's services under this arrangement (rather than detailing Lee for an extra week to Acme's plant on the Government's payroll). The fact remains that both parties acquiesced in the arrangement so that, for one week, Lee was not working for the Government at all; in effect, he became an Acme employee. As such, the compensation which he received did not fall under the statute and the harsh sanction of forfeiture need not be considered.

After Contract 1213 was awarded to Acme, Charles G. Hochstuhl of Philadelphia Ordnance District was assigned to administer it, along with other contracts. As part of his duties in connection with 1213, Hochstuhl recommended changes in the delivery schedule, and journeyed to Ohio in March 1953 in the company of Acme officials to show them existing gun-manufacturing facilities.[20] He was removed from his position with the Government [fol. 243] effective August 4, 1953, "* * * for making material false statements and exaggerations on [his] application standard Form 57," relating to prior private employment. During his notice period, Hochstuhl looked for other work and was employed by Acme in August 1953, immediately following his release. The defendant advised Acme at the time that, for two years thereafter,

---

[20] On his return to Philadelphia Ordnance District from this trip, Hochstuhl submitted a voucher and was paid for his per diem and other trip expenses. An Acme employee had paid $12.50 for Hochstuhl's hotel room charges on the trip, and this expense was charged by Acme against the contract. The defendant suggests that this payment violates the conflict-of-interest provision discussed in connection with Lee. Even if it were a violation, the $12.50 gratuity would not justify cancellation of a $1,200,000 contract.

Hochstuhl could not engage in negotiations with his former employer concerning Acme's contracts.

During the first few weeks of his employment by Acme, Hochstuhl helped Norris as a subcontract expediter. After Norris was discharged in September 1953 and replaced by Jack Epstein as superintendent of the Lansdale plant, Hochstuhl was designated Epstein's assistant. As such he was given a variety of assignments, all of them involving one form or another of paper work. He established a control system for subcontracts, prepared letters to Ordnance for signature by others, correlated plant inspections, and assisted in the preparation of requests for change orders. He had no personal contacts with government representatives in connection with plaintiff's contracts.

In the fall of 1953 Hochstuhl came across a number of vouchers and other cost records in the files, which related to repairs made by Acme to government-owned machines supplied under Facilities Contract 1214 (related to Contract 1213). On his own volition and in the interest of keeping adequate cost records, Hochstuhl undertook to segregate and allocate the cost records to individual machines; thereafter, as additional repairs were made to the machines, he kept a running record of them. There is no suggestion that this record was originally made for the purpose of a claim against the Government; in the fall of 1953 there was no prospect of the contract cancellation which took place in July-August 1954. In September 1954, at the direction of his superiors, Hochstuhl prepared an up-to-date record of Acme's expenditures in repairing the various government-owned machines. It was based on the data he had compiled a year earlier and had kept current in the meantime. The cost record was attached to a letter from Acme (signed by Sidney Cohen, its secretary-treasurer) to Ordnance on September 7, 1954, in which plaintiff refused to return the machines [fol. 244] to the Government unless it gave assurance that Acme would be reimbursed for its cost of repairs. See finding 53.

The defendant charges that Hochstuhl's participation in the preparation of Acme's claim for reimbursement

violated a penal conflict-of-interest statute, which provided that, "within two years after the time when [federal] employment or service has ceased," a former government employee may not "prosecute * * * any claims against the United States involving any subject matter directly connected with which such person was so employed." 62 Stat. 698. Casting aside any doubts that Hochstuhl's work for the defendant was "directly connected" with a claim made by Acme, we reach the question whether his services for Acme amounted to "prosecution" of such a claim. Hochstuhl simply compiled data on which his superiors based a claim which they presented to the Government. The basic information was first assembled by him purely as a matter of record-keeping, *i.e.* before there was any specific thought of a claim. Moreover, Hochstuhl's participation in the total claim process was merely clerical in nature. Other personnel in plaintiff's employ could just as readily have performed the relatively simple duties involved in compilation of costs relating to repair of machines, and his prior government service gave Hochstuhl no special knowledge or inside contacts which contributed to the undertaking in any way that we can see. There is a complete absence of evidence that Hochstuhl participated in the presentation of the claim to the Government after he had completed his assignment. On these facts, we hold that Hochstuhl's activities did not violate any conflict-of-interest statute or afford the defendant a valid basis for annulment of the contract.

D. FALSE CLAIMS ACT

The last reason which the defendant gives for vitiating the contract is the presentation of certain allegedly false claims for payment, both before and after cancellation. As a result of these submissions, the Government argues, Acme's claim was subject to forfeiture under 62 Stat. 978, 28 U.S.C. § 2514,[21] and the corporation may be fined

[21] The statute provides: "*Forfeiture of fraudulent claims.* A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to prac-

[fol. 245] under the False Claims Act, 12 Stat. 696, 31 U.S.C. § 231.[22]

In offering cost figures to the Government on April 29, 1954, in support of its request under the price-redetermination clause for allowance of the maximum ceiling price, plaintiff included certain costs which, while actually expended, are said by defendant not to have been properly chargeable to this contract. These were: subcontractors' costs which included without specification commissions which they had paid to the Tucker group; $12,000 which All Metals had included in its subcontract price to Acme as a result of the extortion scheme carried out by Tucker, Norris and Jack Epstein; payments of salaries and/or commissions by plaintiff to Tucker; $1,045.52 charged by Norris against the contract for personal services rendered by plaintiff's employees on Norris' farm (the facts of which were first discovered by the Government in December 1953); $470 plus hotel expenses paid by plaintiff to Harold J. Lee, whose services have previously been described; and minor hotel, meal and entertainment charges for government employees. The defendant's Board of Awards approved the requested increase in the price on the basis of revised data, but final action was not taken because the contract had been canceled in the meantime.

Another set of allegedly false claims came during the pendency of this suit when the parties held settlement negotiations. In conjunction with these efforts, plaintiff

---

tice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture."

[22] The relevant portions of this statute read as follows: "*Liability of persons making false claims.* Any person * * * employed in the service of the United States, who shall make or cause to be made * * * any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit * * *."

submitted the fiscal aspects of its claim to the Government in August 1958 on a standard contract-termination form, certifying in part that "they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United States * * *." In its proposal, plain- [fol. 246] tiff reclassified several of the previously-mentioned cost items as General and Administrative expenses rather than direct charges, thus allocating only a portion of them to the performance of Contract 1213. This settlement claim was subsequently rejected.

With some modifications the same cost items were again submitted by plaintiff in June 1961 in response to the issuance of an order by the court under former Rule 28 (b). This last submission, which dealt separately with the plaintiff's claims and those of its subcontractors, was accompanied by a letter in which plaintiff said that it had not audited the subcontractors' claims but believed them to be accurate; the covering letter also invited the Government to confer with plaintiff as to any items in the claim which were not properly includable. This Rule 28 damage schedule eliminated certain costs which had been objected to in the termination settlement proposal (payments to Lee, expenses in connection with Norris' farm, certain travel expenses of Tucker, and a few entertainment expenses). Other controverted expenditures were, however, retained in the category of General and Administrative expenses, so that they were proportionately allocated to the contract in suit (*i.e.*, Tucker's salaries and/or commissions paid by plaintiff and the subcontractors).

The defendant has asked not only that the plaintiff's entire claim be forfeited for practicing "fraud against the United States in the proof * * * thereof" (62 Stat. 978, 28 U.S.C. § 2514, *supra*); it has also filed a counterclaim under the False Claims Act, 12 Stat. 696, 31 U.S.C. § 231, *supra*, seeking an affirmative judgment of $6,000 for plaintiff's misrepresentations in the price redetermination proceedings, in the termination settlement proposal, and in the schedule submitted pursuant to former Rule 28(b). But "fraud, resulting in forfeiture, can be found

only on the basis of clear and convincing evidence." *Chelsea Factors, Inc.* v. *United States*, 149 Ct. Cl. 202, 212, 181 F. Supp. 685, 691 (1960). In the Government's effort to supply such "clear and convincing evidence," there is at least one large gap. Plaintiff's costs, exclusive of those challenged as improper, overwhelmingly exceeded the contract ceiling price for which the application in [fol. 247] April 1954 was designed to obtain approval. In a letter sent to the Philadelphia Ordnance District in connection with the application, Acme's accountants noted that certain "recommendations of the Army Audit Agent as to record keeping were not followed because the difference between the ceiling price and the actual costs incurred was so great that any further expenditures on this job should not be undertaken unless * * * absolutely necessary." At the same time, the accounting firm pointed out that the Army would have to disallow $600,000 of Acme's costs in order to fall below the ceiling price of $1,191,077. Defendant's Exhibit 70. The inclusion of the controverted items was thus unnecessary to justify receipt of the ceiling price. Plaintiff had nothing to gain by insertion of these disputed amounts in its claim. That circumstance strongly tends to negate the affirmative intent to defraud which defendant must establish.[23]

Moreover, at the time of the submission of the 1958 and 1961 claims, and probably as early as the initial claim in April 1954, the defendant was aware of the facts concerning each of the allegedly false items. Also, the plaintiff had actually expended the sums involved and, at least in several instances, the propriety of charging them as contract costs, either directly or indirectly by allocation through an overhead account, was debatable or a matter of judgment. While the inclusion of these items may have displayed poor judgment, we are not convinced, in the

---

[23] Defendant claims that the ceiling price is a reflection of all the items submitted in the claim, and therefore, if allowed, it necessarily includes a proportionate part of the allegedly improper costs. The argument might be more convincing if plaintiff's costs had not so greatly exceeded the ceiling price. In the present context, the Government's contention ignores reality.

circumstances, that the plaintiff was endeavoring to deceive.[24]

Citing *United States* v. *Fox Lake State Bank*, 225 F. Supp. 723, 724-25 (N.D. Ill., 1963), defendant argues that it is required, as a precondition of forfeiture, to show only that Acme knowingly submitted false claims. But *Fox Lake* involved the False Claims Act, 12 Stat. 696, 31 [fol. 248] U.S.C. § 231, which does not encompass forfeiture as a sanction. To justify cancellation of the contract, the Government must prove its case under 62 Stat. 978, 28 U.S.C. § 2514, which provides for forfeiture of claims made by "any person who corruptly practices or attempts to practice any fraud against the United States." The statute also requires that the Court of Claims "specifically find such fraud or attempt." An actual intent to defraud is a prerequisite to annulment of the contract under these provisions. See *e.g.*, *Pewee Coal Co.* v. *United States*, 142 Ct. Cl. 796, 806, 161 F. Supp. 952, 958 (1958), *cert. denied*, 359 U.S. 912 (1959); *Kamen Soap Products Co.* v. *United States*, 129 Ct. Cl. 619, 641, 124 F. Supp. 608, 620 (1954).

For the same reasons, a related defense asserted by the Government must likewise fail. The defendant contends that, independently of any statutory provision, it was entitled, on the basis of *Carrier Corp.* v. *United States*, Ct. Cl., No. 346-59, decided Feb. 14, 1964, 328 F. 2d 328, to cancel the contract for the fraudulent and illegal acts of the contractor. But in *Carrier* the court stated unequivocally, "There is no doubt that a fraud was committed." Slip op., p. 11, 328 F. 2d at 334. In the present case, we have, as we have said, very grave doubts that Acme, through submission of the disputed claims, ever intended to defraud the Government. Defendant

---

[24] Defendant mistakenly relies on *Wagner Iron Works* v. *United States*, 146 Ct. Cl. 334, 174 F. Supp. 956 (1959). That case was unlike this one in a number of ways. It involved flagrant padding by inclusion of personal expenses in a cost-plus-a-fixed-fee contract. Furthermore, the scheme was carried out by the corporation's sole stockholders, whose personal intent to defraud the United States was clearly established.

has failed to bear its burden of proving the defense of fraud.[25]

We come now to defendant's counterclaim for $6,000 under the False Claims Act, 12 Stat. 696, 31 U.S.C. § 231, which imposes a $2,000 fine for "any claim upon or against the Government" submitted by one "knowing such claim to be false, fictitious or fraudulent." If Acme included cost items in its 1954 price-redetermination statement even though it knew them to be false, it is subject to a $2,000 fine. See, *e.g.*, *United States* v. *Fox Lake State Bank*, 225 F. Supp. 723, 724-25 (N.D. Ill., 1963); but see *United States* v. *Park Motors, Inc.*, 107 F. Supp. 168, [fol. 249] 174-77 (E.D. Tenn., 1952).[26] Although Acme could not be certain that expenses such as the salaries paid to Tucker were not reimbursable, it could have had no similar doubts regarding the personal services rendered by Acme employees on Norris' farm. This matter was brought directly to the attention of Acme officials by the Federal Bureau of Investigation, but plaintiff failed to remove Norris' personal expenditures from the charges claimed on Contract 1213. Finding 26. This $1,045 charge was subsequently included as a cost component in Acme's April 1954 request for the contract ceiling price. In that manner, plaintiff knowingly submitted a false claim and is subject to a fine of $2,000.

---

[25] Assuming an implied contractual covenant to maintain accurate accounting records, the defendant has also failed to prove that Acme breached such a warranty. The only reason that plaintiff's accountants could not certify its 1954 cost statement was that the firm had not been present to watch the taking of a physical inventory. The accountants' refusal to certify Acme's statement of costs had nothing to do with any inaccuracy or impropriety of the contractor's records. *Cf. Little* v. *United States*, 138 Ct. Cl. 773 (1957).

[26] The *Park Motors* case held that the clause of the False Claims Act with which we are concerned requires a finding of specific intent to defraud. But the language of the statute discloses no such element. Since "proceedings [under the False Claims Act] are remedial and impose a civil [rather than a criminal] sanction," (*United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549 (1943)), we see no justification for adding a requirement that specific intent to defraud be proved.

The Government maintains that inclusion of the same items in the claims submitted by Acme in 1958 and 1961 justifies the imposition of two more civil penalties of $2,000 each. But Norris' farming expenditures were not included in the 1961 statement, and it is difficult to imagine that plaintiff even recalled this item when it submitted the 1958 termination-cost proposal. Moreover, we are not dealing with different expenditures; the subsequent claims contained the same costs which the Government had previously challenged. The present case is unlike those in which numerous vouchers are submitted to the Government, and each contains a separate and distinct false claim for which the fine may be validly imposed. *Eg., United States* v. *Ueber*, 299 F. 2d 310, 313 (C.A. 6, 1962); *United States* v. *National Wholesalers*, 236 F. 2d 944, 950 (C.A. 9, 1956), *cert. denied*, 353 U.S. 930 (1957). We are faced, rather, with one false claim, which was denied by the Government and thereafter reasserted by the plaintiff. The court holds that the defendant cannot recover more than once for the very same false claim; it is therefore entitled only to $2,000 by way of counter-claim.

In sum, we conclude that none of the legal defenses which the Government has asserted justifies its cancellation of the contract in the summer of 1954 for the alleged [fol. 250] fault of the contractor. When the Government is displeased with the contractor's administration of an agreement, it may always sever contractual relations under the standard termination-for-convenience clause inserted in its contracts. *John Reiner & Co.* v. *United States*, Ct. Cl. No. 431-57, decided Dec. 13, 1963, 325 F. 2d 438, *cert. denied*, 377 U.S. 931 (1964). But if the United States seeks instead to annul a contract for fault, thereby leaving the contractor wholly uncompensated, it must have proper justification for such harsh consequences. *Klein* v. *United States*, 152 Ct. Cl. 8, 285 F. 2d 778 (1961); *Nesbitt* v. *United States*, Ct. Cl. No. 321-61, decided May 14, 1965, fn. 2.

II. PLAINTIFF'S DAMAGES

A. GENERAL STANDARD

Having rejected each of the absolute defenses urged by the Government, we must determine the appropriate measure of damages incurred as a result of the improper cancellation. The position advanced by the defendant, and accepted by the Trial Commissioner, is that plaintiff is entitled only to the traditional remedy of damages given by this court for breach of an express contract. The purpose of that remedy is to place the party against which the breach has been committed in the position it would have held if the contract had been fully performed. Acme had suffered large losses in the performance of Contract 1213 at the time it was wrongly canceled by the defendant. According to projections, however, Acme would have been able to reduce its losses considerably had it been permitted to complete the contract. The Trial Commissioner therefore determined that plaintiff was entitled to recover any post-cancellation costs incurred as a result of the Government's erroneous action, plus the amount by which it would have been able to decrease its losses through completion of the contract. In this way, the Commissioner reasoned, Acme would be given the same benefits it would have received had it been permitted to carry out the agreement.

Plaintiff's main argument is that it is entitled to restitution as an alternative remedy. Under that standard of relief, a party whose contract has been repudiated or otherwise breached may, if he meets certain conditions, [fol. 251] recover the reasonable value of his services, measured as of the time of performance. The purpose is to restore the injured party to the pre-contract *status quo*, not to put him in his post-contract position. Restitution has long been recognized by the commentators as one of three possible remedies for the substantial breach of an express contract, the others being damages and specific performance. See Restatement, Contracts §§ 347-57; 5 Corbin, *Contracts* §§ 1102-21 (1951); 5 Williston, *Contracts* §§ 1454-85 (rev. ed. 1937). The Restatement contains a full discussion of restitution in its chapter entitled

"Judicial Remedies for Breach of Contract." Corbin states explicitly, "In the present chapter we are dealing with restitution as a remedy for breach of contract; a judgment for such restitution is as truly a remedy for a 'breach' as is a judgment for damages." 5 Corbin, *Contracts* § 1104 (1951). The applicability of restitution as an alternative remedy for breach is also well-established in both the federal and the state courts. *E.g.*, *Michael Del Balso, Inc.* v. *Carozza*, 136 F. 2d 280 (C.A.D.C., 1943); *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F. 2d 606, 610 (C.A. 2, 1944); *Southern Painting Co.* v. *United States ex rel. Silver*, 222 F. 2d 431, 433-34 (C.A. 10, 1955); *Valente* v. *Weinberg*, 80 Conn. 134, 67 Atl. 369 (1907); *Pelletier* v. *Masse*, 49 R.I. 408, 143 Atl. 609 (1928).[27]

Although the Court of Claims has permitted *quantum meruit* recovery for contracts implied in fact (see, *e.g.*, *New York Mail & Newspaper Transp. Co.* v. *United States*, 139 Ct. Cl. 751, 759, 154 F. Supp. 271, 276, *cert. denied*, 355 U.S. 904 (1957)), no past contractor has successfully sought restitutionary relief for breach of an express contract. But unless this form of recovery is precluded by our general jurisdictional statute, 28 U.S.C. § 1491, we must be guided by the principal that, "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry* v. *United States*, 294 U.S. 330, 352 (1935). See, also, *New York Mail & Transp. Co.* v. *United States*, [fol. 252] *supra*, 139 Ct. Cl. at 759, 154 F. Supp. at 276; *Refining Associates, Inc.* v. *United States*, 124 Ct. Cl. 115, 120, 109 F. Supp. 259, 261 (1953). Since contracts with the United States are to be governed by the same principles as "those between man and man" (*Gilbert* v. *United States*, 1 Ct. Cl. 28, 37 (1863), aff'd, 75 U.S. (8 Wall.)

[27] *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, *supra*, 146 F. 2d at 610, a leading case in this area, involved unit prices in a construction contract, and the defendant contends that recovery on the basis of restitution must be limited to cases of of that nature. But neither *Zara* nor any of the other cases or commentaries intimate the existence of such a restriction.

358 (1869), and see *Padbloc Co.* v. *United States*, 161 Ct. Cl. 369, 377 (1963)), we are obliged to award restitution to a petitioner meeting the prescribed qualifications, unless there is some jurisdictional impediment.

The Tucker Act empowers this court "to render judgment upon any claim against the United States founded * * * upon any express or implied contract with the United States * * *." 28 U.S.C. § 1491. Although this precludes recovery on the basis of a contract merely implied in law (see *Sutton* v. *United States*, 256 U.S. 575, 581 (1921)), the plaintiff seeks restitution for breach of an *express* contract, which clearly comes within the ambit of the Act. The cases cited by the Trial Commissioner simply denied "quantum meruit" (*i.e.* restitutionary) recovery for the alleged breach of an express contract where the court determined that no breach had in fact taken place. See *Lacchi Constr. Co.* v. *United States*, 102 Ct. Cl. 324, 355-56 (1944); *Frazier-Davis Constr. Co.* v. *United States*, 100 Ct. Cl. 120, 161-62 (1943); *Steel Products Eng'r Co.* v. *United States*, 78 Ct. Cl. 410, 418 (1933).[28]

The Government says that, even if restitution is an available remedy, Acme has not met the conditions necessary for recovery on that basis. The accepted rule is that,

> If the performance that the contract required of the plaintiff has been wholly prevented, and if the result of his labor and expenditure still belongs to him, he has no remedy by way of restitution. If the performance required was the production and delivery of a finished article, and the defendant wrongfully prevents completion and delivery of the article, the plaintiff cannot get judgment for the reasonable value of his work and labor in preparation to perform, ex-

[28] These cases contain broad statements to the effect that "*quantum meruit* cannot be allowed where there is a valid contract between the parties." *Frazier-Davis Constr. Co.* v. *United States*, *supra*, 100 Ct. Cl. at 162. In each one, however, *quantum meruit* relief appears to have been considered, as an alternative, only after the court found that the contract was *not* breached.

[fol. 253] cept so far as it may be included in a claim for damages. Such work and labor is not itself requested or received by the defendant.

Restatement, Contracts § 348, Comment "c". Defendant contends that Contract 1213 was for the purchase of (completed) 75 mm. recoilless rifles from plaintiff, and therefore contemplated "the production and delivery of finished article[s]," for the breach of which plaintiff is entitled only to damages. This misconceives the nature of the contract which states, expressly, that Acme is to "*furnish* and deliver" specified items (emphasis added). The entire pre-contract negotiations were based on the assumption that it was Acme which would manufacture the requested rifles. The defendant at first had reservations about plaintiff's ability to perform the contract, but, after investigating Acme's plant and personnel, the Government concluded that Acme and its subcontractors would be capable of carrying out the agreement. Defendant's Exhibit 12. One of the contemplated benefits of awarding the contract to Acme was that "placing this procurement [in] subject contractor's plant will not only broaden the manufacturing base but create a salutary effect, price-wise, on all other procurements of this type." *Ibid.* Thus, the Government contracted not only for a finished product, but also for the manufacture of that product by Acme. When an agreement of this nature is breached, restitution is available.

The next argument is that plaintiff's recovery must be limited to the reasonable value of the goods it actually delivered prior to cancellation. It is clear, however, that restitution is permitted as an alternative remedy for breach of contract in an effort to restore the innocent party to its pre-contract *status quo*, and not to prevent the unjust enrichment of the breaching party. "Judgment will be given for the value of service * * * rendered, even though the product created thereby has been lost or destroyed by the defendant, and *even though there never was any product created by the service that added to the wealth of the defendant.*" Restatement, Contracts § 348, Comment "a" (emphasis added.) It is when the plaintiff is the party in default that his recovery may be limit-

ed by the amount of the benefit to the defendant. See [fol. 254] *Schwasnick* v. *Blandin*, 65 F. 2d 354, 357 (C.A. 2, 1933). But "if the promisee has performed so far as he has gone, and the promisor breaks his promise, the promisee may abandon the contract and sue for restitution, in which he can recover the reasonable value of his services, measured by what he could have got for them in the market, and not by their benefit to the promisor." *Ibid.* See, also, Restatement, Contracts § 347, Comment "c". Acme's recovery is not limited to the value of the goods received by the Government under the contract; rather, it can be based on the reasonable value of the entire performance.

Acme's position is that the reasonable value of its services is most accurately reflected by the actual costs it incurred in the performance of Contract 1213. As the best means of restoring the *status quo ante*, cost of performance is often used as the basis for determining the amount of *quantum meruit* recovery, in the absence of "any challenging evidence." *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F. 2d 606, 611 (C.A. 2, 1944); see, also, *United States ex rel. Arc & Gas Welder Associates, Inc.* v. *Blount*, 182 F. Supp. 648, 665 (D. Md.), *aff'd*, 285 F. 2d 863 (C.A. 4, 1960), *cert. denied*, 366 U.S. 919 (1961); *United States ex rel. Wander* v. *Brotherton*, 106 F. Supp. 353, 354-55 (S.D.N.Y., 1952). But if the defendant is able to show that the costs incurred by the contractor were excessive (as a result, for example, of inefficiency or extravagance), the amount of recovery is commensurately reduced. *Cf. Barrett Co.* v. *United States*, 273 U.S. 227, 235 (1927); *United States* v. *Behan*, 110 U.S. 338, 345-46 (1884).[29]

---

[29] Relying on *United States* v. *Penn Foundry & Mfg. Co.*, 337 U.S. 198 (1949) and *Chain Belt Co.* v. *United States*, 127 Ct. Cl. 38, 59, 115 F. Supp. 701, 714–15 (1953), the Government claims that Acme is not entitled to restitution on the basis of its costs, because those costs were in no way caused by the defendant's breach. The cited cases treat with the disallowance of lost *profits* as damages when they are too speculative. Since the theory behind restitution is to restore the *status quo ante*, potential profits under the rescinded contract are irrelevant.

It is likewise immaterial that, under a convenience-termination, plaintiff's recovery would be limited by its costs and the ceiling

[fol. 255] The record before us is inadequate to determine whether Acme's costs were, in fact, excessive. Plaintiff's expenses appear to be inordinately high even if one takes into account its lack of experience in this manufacturing line and the prospective advantage to the Government of broadening the base of procurement. The contract ceiling price, for instance, was $384.95 per unit, but plaintiff's actual cost in manufacturing the first 446 rifles was $1,179.29, and its cost of production during the last six months of the contract was $690.21. See findings 7, 52(a), (c). Although it is conceivable that these expenditures accurately reflect the value of Acme's services, the present record does not provide enough information for a sufficiently accurate answer. In particular, it would seem important to compare Acme's costs with those of other manufacturers of the same rifles during that period, taking into consideration that Acme should be permitted greater reimbursement than established manufacturers because of its inexperience and the anticipated benefits of its entry as a competitor. Since this issue was not squarely presented at the original trial, the defendant had no real opportunity to prove that plaintiff's costs were inflated; it should be permitted to do so now. We are therefore remanding the case to the Trial Commissioner under Rule 47(c) for a separate determination of liability.

To the extent that Acme's actual costs are used in making this determination, the Commissioner should consider that the amounts which plaintiff paid its subcontractors latently included reimbursements for kickbacks paid to various members of the Tucker organization. See findings 18-25. Although the defendant has not attempted to prove that any of the subcontract prices were inordinate-

---

price. The cancellation here was for the contractor's fault, and in such a situation the rule of *John Reiner & Co.* v. *United States*, *supra*, is inapplicable if there was in fact no default. See *Klein* v. *United States*, *supra*; *Goldwasser* v. *United States*, Ct. Cl., No. 477-61, decided Dec. 13, 1963, 325 F. 2d 722; *Litchfield Mfg. Corp.* v. *United States*, Ct. Cl., No. 453–56, decided Oct. 16, 1964, slip. op., p. 4, fn. 9, 338 F. 2d 94, 96; *Dale Constr. Co.* v. *United States*, Ct. Cl., No. 134–57, decided Dec. 11, 1964, slip op., p. 26; *Nesbitt* v. *United States*, *supra*.

ly high, the kickbacks involved were hardly ordinary business expenses incurred in manufacturing 75 mm. rifles. If Acme's total costs are to measure the value of its services, they must be reduced by any kickbacks actually paid to the Tucker organization by plaintiff's subcontractors. Nor should Acme be reimbursed for the amounts it paid to Tucker; for the reasons given in the companion case, we conclude that his employment violated the covenant against contingent fees. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538-59, decided this day.[30] [fol. 256] Tucker's salaries cannot be considered reasonable expenses which enhanced the value of Acme's services to the Government. Neither the contingent fee payments nor the kickbacks may be included in the computation of Acme's restitutionary recovery.[31]

B. GOVERNMENT-FURNISHED MACHINERY

Plaintiff urges that a determination of the reasonable value of its contract performance must take into account costs incurred as a result of defective government-furnished machinery. By supplying deficient equipment, it is alleged, the defendant forced Acme to render additional services, which had market value and are compensable under the theory of restitutive recovery. The purportedly defective machinery was, however, furnished under a separate facilities contract, not the main contract. That agreement explicitly disclaimed liability "for damages or loss of profit by reason of any delay in delivery or fail-

---

[30] Acme's misrepresentations to the defendant concerning Tucker's employment form an additional ground in this case for holding that the covenant was breached.

[31] The legal fees incurred by plaintiff in defending suits brought by subcontractors and in submitting its termination claim did not add to the value of its services, and therefore may not be considered in calculating plaintiff's recovery.

The computation of recovery should, however, take into account that, on two occasions, the defendant ordered Acme to suspend further operations until given instructions to continue. See findings 42(b), 47. Any stand-by costs incurred by plaintiff during these periods are compensable, since they added to the value of its performance.

ure to deliver any or all of the items set forth * * *, or *for delivery of such items not in satisfactory operating condition or not of a suitable type.*" (Emphasis added.) The contract also stipulated, "In the event [government-furnished] items are not in fit operating condition, the Contractor shall repair, restore, or rehabilitate such equipment so as to make it serviceable or fit for use (cost connected with such repairs, restoration, or rehabilitation shall not be reimbursed to the Contractor)." If the provisions concerning government property had been included in the main contract, such a disclaimer or limitation of liability for breach of warranty would possibly have to be disregarded under plaintiff's theory, which fixes the measure of recovery by the value of the services performed, rather than by the terms of the breached contract providing or restricting compensation. But the [fol. 257] facilities contract was separate and was not materially breached; its clauses limiting liability remain in effect.[32] We must therefore determine whether the plaintiff is correct that the disclaimer clause is less-than-absolute and does not bar recovery for increased costs resulting from defective government machinery.

Plaintiff would have us read this disavowal of liability as applicable only to ordinary repairs made following delivery of the equipment. Because the disclaimer refers to Acme's obligation to repair the machinery in case of "delivery of such items not in operating condition," Acme infers that the cost of extraordinary repairs incurred in the course of performance was to be borne by the defendant. Aside from the practical difficulty of separating "normal" and "extraordinary" expenses, there is a more basic objection. The terms of the disclaimer are broad, and refer to Acme's duty to repair items "not in operating condition," without imposing any limitation as to the time when the equipment becomes inoperable or the amount of work required to fix it. There is no reason to qualify or limit the general sweep of the contract words.

On the other hand, along with the disclaimer, the fa-

[32] Although the main contract also contained a government-furnished property clause, it was superseded by the more extensive provisions of the separate facilities agreement.

cilities agreement also specified that, if the equipment supplied by the Government required repair as a result of defects present at the time of delivery, the "Contracting Officer, upon written request of the Contractor, may equitably adjust the price, the time of performance, and other terms and conditions of the affected supply contract(s). * * * Any failure by the parties hereto to agree upon such equitable adjustment shall be determined in accordance with the article of the related supply contract(s) entitled 'Disputes'." See finding 35. We do not interpret these provisions as inconsistent with the explicit disavowal of liability. Instead, they specify the only form in which relief can be obtained for injuries resulting from substandard machinery furnished by the defendant; unless the contractor makes timely written request for an equitable adjustment, he must, according to the disclaimer, bear all costs of resulting delays and repairs. See, generally, [fol. 258] Goodwin, *Government-Furnished Property*, Government Contracts Monograph No. 6, p. 17 (1963); Paul, *United States Government Contracts and Subcontracts* 267 et seq. (1964).[33]

During the course of contract performance, Acme made at least two written requests for reimbursement of costs incurred as a result of defects in equipment supplied by the defendant. See finding 39(b)(2), (6). About one week after cancellation, on August 26, 1954, the plaintiff filed a claim with the Philadelphia Ordnance District, asking to be repaid for all parts which it purchased to make the defendant's machinery workable. Finding 44(a). This August 1954 request is challenged by the defendant as untimely. Considering all the circumstances, we cannot agree. The machinery was supplied to plaintiff

---

[33] See, also, *E.H. Sales, Inc.* v. *United States*, Ct. Cl., No. 75–61, decided Jan. 22, 1965, 340 F. 2d 358; *Topkis Bros.* v. *United States*, 155 Ct. Cl. 648, 297 F. 2d 536 (1961), *rehearing denied*, 155 Ct. Cl. 680, 299 F. 2d 952 (1962). In *Ekco Products Co.* v. *United States*, Ct. Cl., No. 464-57, decided Jan. 11, 1963, 312 F. 2d 768, plaintiff was permitted to recover breach-of-contract damages for costs resulting from defective government-furnished property. In that case, the contract contained no disclaimer, and a warranty of fitness could reasonably be implied from the contractual provisions. See slip op., pp. 5–6, 17–18, 312 F. 2d at 771.

throughout 1953; although some performed reasonably well, other pieces required constant tinkering and broke down repeatedly, disrupting the smooth flow of production. See findings 39(b), 43(c). At least as late as May 1954, flaws in the government machinery were still being encountered (see finding 39(b)(11), and, if past experience is the guide, such difficulties were probably prevalent until the suspension of contract performance a little over a month later. Had plaintiff been required to ask for an equitable adjustment each time a minor defect was discovered, the result would have been a continuous flow of such requests to the contracting officer. The time and effort expended by both parties in effecting numerous equitable adjustments would have been excessive. Instead, Acme apprised the defendant of the various difficulties at approximately the time they were encountered, but, with several minor exceptions, it in effect waited until after the abrupt termination of the contract to make a single request for compensation. This was undoubtedly [fol. 259] the most efficient manner of obtaining relief. Plaintiff's cumulative demand for reimbursement in August 1954, as well as the two requests made prior to annulment of the contract, were timely.

Plaintiff's letters sought reimbursement for repair costs, without specifically invoking the equitable adjustment provision of the facilities contract or the Disputes article of the supply contract. But the letters were easily understandable, and the failure to delineate the precise clauses permitting recovery should not stand as a bar. *Cf. Specialty Assembling & Packing Co.* v. *United States*, 156 Ct. Cl. 252, 254-55, 298 F. 2d 794, 796 (1962). To the extent that the trial commissioner finds that these timely claims for reimbursement reflect actual costs incurred by the contractor because of defective government equipment—rather than its own inexperience or inefficiency—the plaintiff is entitled to an equitable adjustment as provided in the facilities contract. This equitable adjustment should be added to the determination of the value of the rest of plaintiff's performance.[34]

---

[34] Since no administrative proceedings were held on any item of damage including this one, it may be assessed, together with the

III. LIQUIDATED DAMAGES

Throughout the contract plaintiff was behind in its deliveries. The original schedule was substantially revised in supplemental agreements executed in August 1953 and January 1954. Despite these time extensions, plaintiff was still late in deliveries at the time of the suspension of its contract in July 1954, and was assessed liquidated damages pursuant to the contract clause. On that basis, $53,715.19 was withheld from payments otherwise due. Claiming that the liquidated damages provision was erroneously invoked, Acme asserts that it is entitled to reimbursement of the entire amount.

There is a question whether plaintiff is barred from making this claim because it did not request a decision of the contracting officer on the cause of its tardy deliveries. In Contract 1213, the clause dealing with liquidated damages contains a paragraph excusing the contractor from [fol. 260] paying liquidated damages when the delay arises out of causes beyond his control and without his fault or negligence. It says that in such cases, subject to the Disputes clause, "the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance when in his judgment the findings of fact justify an extension." The Disputes clause says simply that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer * * *." [35] It cannot be said that these provisions taken together, required the contractor to make a specific request to the contracting officer for a determination of the reasons for the delays. So long as the contracting officer was

---

other elements of recovery, under our Rule 47(c). See *Stein Bros. Mfg. Co.* v. *United States*, *supra*, Ct. Cl., No. 389–59, decided July 12, 1963, 337 F. 2d 861.

[35] The defendant also relies on provisions of the facilities contract which make no mention of liquidated damages, but which require plaintiff to make a written request for an equitable adjustment in the time of performance, if the government-furnished machinery is defective. Assuming that these provisions are applicable to liquidated damages, we think that plaintiff's letters of May 20 and June 21, 1954 (see *infra*) satisfied this requirement.

put on notice that the plaintiff wanted to avoid the levy of liquidated damages, the minimum demands of the contract would be met.

This is precisely the effect of a letter sent on May 20, 1954, by plaintiff to the Comptroller General via Philadelphia Ordnance District. The contracting officer refused to forward the letter as requested, because he felt that the appeal was addressed to equitable rather than legal considerations and would not be cognizable by the Comptroller General. After being told of the contracting officer's action, Acme wrote another letter to him on June 21, 1954, explicitly reaffirming the prior request and "asking relief from our Liquidated Damages Clause at the *District* level" (emphasis added). This notification was quite different from the "mere ambiguous requests for adjustments or possible negotiations" which were deemed insufficient in *Specialty Assembling & Packing Co. v. United States, supra*, 156 Ct. Cl. at 255, 298 F. 2d at 796. Acme's letters put the defendant on notice both as to the relief requested and the contract clause on which the request was based; furthermore, in its June 21st letter, plaintiff invited a ruling by the contracting officer. It is clear that plaintiff was in effect asking for an equitable adjustment; the need for a degree of precision, as [fol. 261] suggested in *Specialty Assembling*, was met. When the defendant suspended all production on July 22, 1954, and completely canceled the contract a month later, the contracting officer had taken no action on Acme's demand for remission of liquidated damages; the annulment of the agreement destroyed the administrative appeal mechanism created by the contract. Since Acme properly sought to invoke its administrative remedies as long as they were available, the Government's defense of failure to exhaust must be rejected.

Having surmounted this procedural defense, plaintiff is entitled to recover on its claim for remission of liquidated damages, because the delays on which the assessment was based were caused by the Government as well as by Acme. On the one hand, the plaintiff's difficulties in operating the government machinery were partially attributable to the inexperience and incompetence of its own

personnel. On the other, defects in some of the equipment furnished by the defendant resulted in repeated failures and breakdowns. While some of the machines performed reasonably well if properly operated, the smooth flow of production was rendered impossible when other machines essential to a sequence of operations were in disrepair. See finding 43. "[W]here delays are caused by both parties to the contract the court will not attempt to apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled." *Schmoll* v. *United States*, 91 Ct. Cl. 1, 28 (1940). See, also, *United States* v. *United Eng'r & Contracting Co.*, 234 U.S. 236, 242 (1914); *Vogt Bros. Mfg. Co.* v. *United States*, 160 Ct. Cl. 687, 709 (1963); *Commerce Int'l Co.* v. *United States*, Ct. Cl., No. 287-55, decided Oct. 16, 1964, slip op., p. 12, 338 F. 2d 81, 90. That result is fair. It does not deprive the Government of an opportunity to prove and recover its actual damages caused by the contractor's delay[36]; instead, the defendant merely loses its right to insist on an artificial measure [fol. 262] of damages agreed on by the parties for the situation in which the contractor alone is responsible for the delay.[37]

IV. SUBCONTRACTORS' RIGHT TO RELIEF

Along with its own claim, Acme has brought suit on behalf of a number of firms to which it sublet portions of the prime contract. The three major subcontract claims are those of All Metals Industries, Manalapan Machine Works, and Foley Machine Company. Each of these subcontractors obtained orders from Acme through the pay-

[36] Since the Army had decided to discontinue the use of 75 mm. rifles at the time Acme's contract was canceled, proof of actual damages would be virtually impossible.

[37] Since the issue of liquidated damages has been resolved in Acme's favor, it is unnecessary to pass on the broad contention advanced by plaintiff that, when the contractor is given restitutionary recovery, the contract is effectively wiped out, and the Government automatically loses any rights it may have had under the liquidated damages clause.

ment of kickbacks to Harry K. Tucker, Jr.[38] See findings 18-23. At the time the kickbacks were given, All Metals knew of Tucker's double agency, and the other two subcontractors either knew or should have known of it. On the other hand, Acme was unaware of Tucker's duplicity.

When a contract is obtained by a person secretly acting as a dual agent, and one party knew or should have known of the double employment, only the innocent party has the option of either affirming or avoiding the agreement.[39] Affirmance is not effective as ratification until after the innocent party obtains full knowledge of the material facts concerning the fraudulent procurement. See Restatement, Agency 2d, §§ 91, 313. In the present case, it was not until well after cancellation of its prime contract that Acme, the innocent party, learned of the kickback arrangements. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538-59, decided this day, fn. 20. Prior to that time, it did not have the requisite knowledge to effect ratification.

When its prime contract was canceled by the Government, Acme responded by immediately requesting all its [fol. 263] subcontractors to halt performance. From that time forward, the plaintiff had nothing to gain by ratification of its voidable subcontracts. Yet long after conclusion of performance, Acme has nonetheless chosen to "ratify" these agreements. The reason is not difficult to discern: Only if Acme is liable to the subcontractors, may Acme recover from the defendant in their behalf. See *J. L. Simmons Co.* v. *United States*, 158 Ct. Cl. 393, 304 F. 2d 886 (1962). Acme was apparently willing to affirm

---

[38] Foley's payments were actually made to Neptune Manufacturing Company, a dummy corporation formed by Tucker and Norris to carry out their kickback activities. When it paid the kickbacks, Foley knew of Tucker's relationship to Neptune. Tr. 657–58.

[39] The rule that a party knowing of the double agency may not disavow the contract is traditionally stated in terms of actual knowledge. In the present case, both Foley and Manalapan denied having such knowledge. Tr. 668, 682. Judging from the circumstances, however, these two subcontractors were hardly innocent parties and, at the very least, can plainly be saddled with constructive knowledge.

the agreements on the theory that the Government would probably bear any resulting liability.[40] As is pointed out in the discussion of All Metals' claim in the companion case, No. 538-59, this form of after-the-fact ratification cannot be accepted since it violates the rule that "affirmance is * * * inoperative as ratification * * * as against persons who in the meantime have acquired interests with which it would be unjust to interfere." 2 Williston, *Contracts* § 278A n.1 (3d ed. 1959).[41] See, also, Restatement, Agency 2d, § 101(c). Had Acme acted reasonably, avoiding these subcontracts after it found out about the improper double agency, the Government would not be liable. This freedom from liability is an "interest with which it would be unjust to interfere." Acme's attempt to destroy that interest by post-cancellation ratification of the moribund subcontracts is unavailing.

It is still necessary to determine whether the Government would be liable to All Metals, Manalapan, and Foley, if Acme had in fact avoided these subcontracts, as we have held it was bound to do. Before a contract may be rescinded because of its fraudulent procurement by one of the parties, to prevent unjust enrichment, the defrauded party is generally required to return the goods it received under the contract, or their reasonable value. See Restatement, Restitution §§ 65, 66. Since these three subcontractors would have been entitled to the reasonable value of the goods they actually delivered, the defendant [fol. 264] should in turn be liable to that extent.[42] *Cf.*

---

[40] The agreements with both All Metals and Manalapan specifically provided that, if the defendant terminated the prime contract, Acme would be liable to the subcontractor only to the extent the latter's claims were allowed and paid by the United States. See finding 64(b), (c). With regard to these two claimants, if Acme's purported ratification were allowed to stand, its effect would be to make the defendant exclusively liable.

[41] Since this principle is determinative for the present, we need not at this stage consider the Government's defense based on the "Severin" doctrine. See *Severin* v. *United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944).

[42] This measure of damages is of course far less than that which Acme itself is receiving, since it is recovering the reasonable value of *all* its services, whether they resulted in actual deliveries to the

Crocker v. *United States*, 240 U.S. 74, 81-82 (1916). In the future proceeding before the Commissioner, if plaintiff is able to prove that the value of the items delivered by any of the three subcontractors exceeded the total amount it was paid, then recovery on behalf of that subcontractor will be permitted—unless the "Severin" doctrine is a bar (see footnote 41, *supra*).

With respect to the claims of the remaining subcontractors, there has thus far been inadequate proof of damages. Although the defendant audited the accounting records of each one, such verification is no substitute for actual evidence of injury. See *River Constr. Corp.* v. *United States*, 159 Ct. Cl. 254, 271 (1962). When this question arose during the trial, plaintiff's counsel acknowledged that further proof was required, explaining that, although the other subcontractors had been invited to submit more detailed claims, they had failed to so so. Tr. 1396-97. These claims being unproved, they cannot be accepted at the present time. Plaintiff, however, may present further proof, if it can, in the proceedings under Rule 47(c).

V. INTEREST

The last matter is the plaintiff's demand for interest from January 1, 1955, on those parts of its overall claim for damages represented by (1) the improper assessment of liquidated damages by the defendant, (2) the withholding of amounts due under the price redetermination provision of the contract, and (3) the failure to pay the equitable adjustment requested in August 1954 for repairs of government-furnished machinery. These amounts, the plaintiff says, were retained by the defendant without any color of right and thus come within the circle of the Fifth Amendment's guarantee that property shall not be taken for public use without payment of

---

United States or not. To the extent that the three subcontractors incurred expenses on unfinished or undelivered goods, they may not recover. This disparity is only fair, since Acme is recovering on a contract breached by the United States, while each subcontractor's agreement must be treated as rescinded because it was fraudulently procured from Acme.

just compensation. This type of demand is not novel in [fol. 265] suits on government contracts; nor is its steadfast repudiation by the courts. See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-59 (1947); *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 335-36 (1920); *Komatsu Mfg. Co.* v. *United States*, 132 Ct. Cl. 314, 131 F. Supp. 949 (1955); *Ramsey* v. *United States*, 121 Ct. Cl. 426, 430-33, 101 F. Supp. 353, 355-57 (1951).

Plaintiff concedes that, under the case law, unless the Government acted in bad faith when it withheld the funds in dispute, there could be no violation of the Fifth Amendment, and recovery of interest on the basis of the contract would be prohibited by 28 U.S.C. § 2516(a), permitting this court to allow interest on a claim "only under a contract or Act of Congress expressly providing for payment thereof." To show bad faith, the plaintiff stresses a determination by the Department of Justice in December 1954 that it would bring no civil or criminal action against Acme. But, plainly, this was not tantamount to a finding of bad faith on the part of the Army; a difference of opinion is not proof of malice. The plaintiff also alleges that, at the time of cancellation, the Government did not have proof that plaintiff was guilty of fraudulent acts which would justify annulment; that the Government knew that its proposed action might force plaintiff into bankruptcy; and that the real cause of the cancellation was the defendant's decision to discontinue production of 75 mm. recoilless rifles because they were obsolete. At the trial of this case, an Ordnance attorney who advised that Contract 1213 be rescinded testified that, at the time, he deemed this action appropriate because he thought plaintiff had violated the covenant against contingent fees, as well as the anti-kickback and false claims statutes. Tr. 1024-25. Assessing the credibility of this witness and the others who testified as to the matter, the Trial Commissioner concluded that the defendant canceled the contract for two equally potent reasons: the termination of military requirements for the 75 mm. rifles *and* the contractual irregularities thought to be present. Finding 50 (a). The circumstantial evidence submitted by plaintiff

to overcome the presumption of correctness attaching to [fol. 266] the Commissioner's finding is wholly inadequate for that purpose. *Cf. Commerce Int'l Co.* v. *United States*, Ct. Cl. No. 287-55, decided Oct. 16, 1964, slip op., pp. 6-7, 338 F. 2d 81, 86; *Davis* v. *United States*, Ct. Cl., No. 179-59, decided Feb. 14, 1964, slip op., pp. 4-5. We must therefore turn aside Acme's argument that the Government acted in bad faith.

Our conclusion is sustained by an examination of the specific claims which, according to plaintiff, were rejected in bad faith. The Government withheld liquidated damages, thinking that the contract gave it the right to take such action. The court's determination that liquidated damages were not properly assessable in no way negates the existence of a bona fide dispute involving difficult legal issues. Similarly, so far as can be ascertained, the defendant had almost concluded at the time of the contract annulment that the plaintiff would be entitled to the ceiling price under the redetermination clause. But it withheld this amount, along with other entitlements, because of an honest belief that plaintiff's conduct merited forfeiture. Although the defendant erred in believing that it could annul Acme's contract for violation of such provisions as the covenant against contingent fees, it cannot be charged with bad faith. Finally, the Government's failure to allow an equitable adjustment for expenses incurred in repairing machinery furnished under the facilities contract is attributable to its view that the disclaimer provision was absolute. In none of these instances was the defendant's action without some color of right. Even though a court may determine eleven years later that the Government's premises were faulty, that does not alter the bona fide character of its original actions under the contract or convert the erroneous cancellation of the contract into a taking.[43]

---

[43] We do not reach the issue of whether there would be a taking (for which just compensation should be paid) if bad faith on the part of the defendant had been shown. In addition, we point out that the statute of limitations bars recovery by the plaintiff on this ground. Acme first alleged a Fifth Amendment taking in an amendment to its petition, filed in September 1961. Since the amendment

[fol. 267] VI. SUMMARY

The case is remanded to the Trial Commissioner for a determination, under Rule 47(c), of the defendant's liability to Acme, based on (a) the reasonable value of its performance under Contract 1213; and (b) an equitable adjustment for the amounts expended under the facilities contract for repair of defective government machinery, for which timely requests were filed. The total thus arrived at should be reduced by defendant's undisputed counterclaim for $15,898 (see finding 60), and by $2,000, based on plaintiff's violation of the False Claims Act. Plaintiff has permission, in proceedings under Rule 47(c), to present further proof on the claims on behlaf of all subcontractors other than All Metals, Foley, and Manalapan; in the absence of sufficient proof, those claims will be dismissed. The claims on behalf of All Metals, Foley, and Manalapan are remanded to the Commissioner for a determination under Rule 47(c) of the extent of liability for delivered items, if there is any such liability.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes findings of fact as follows:

1. *Plaintiff's corporate identity and control.* Acme Process Equipment Company (formerly Acme Coppersmithing and Machine Company) is a Pennsylvania corporation located at Oreland, Pennsylvania. At relevant

---

stated a new cause of action, it had to be filed within six years after the claim accrued. See *Dawnic Steamship Corp.* v. *United States*, 90 Ct. Cl. 537, 580 (1940). But all events fixing the defendant's liability for the alleged taking had occurred on or before January 1, 1955. Plaintiff's claim having accrued by that date, it is barred by the six-year statute of limitations. The fact that settlement negotiations continued thereafter is irrelevant. See, *e.g.*, *Cuban Truck & Equipment Co.* v. *United States*, Ct. Cl. No. 245–57, decided June 12, 1964, slip op., pp. 5, 6–8, 333 F. 2d 873, 877–79; *Empire Institute of Tailoring, Inc.* v. *United States*, 142 Ct. Cl. 165, 168, 161 F. Supp. 409, 411 (1958).

times all of its voting stock was owned jointly by its president and vice president, Joshua Epstein and Samuel Fisher, respectively, who also had controlling interest in the National Molasses Company, a separate corporation. They and their children and relations (including sons Irving and Jack Epstein) owned all of the non-voting stock of plaintiff company and served as its officers.

2. *Acme's line of business.* Until the latter part of 1952 Acme's business consisted principally in the manufacture of processing tanks, boilers, containers, etc., for the distillery, brewery and sugar industries. In 1952 it became interested in obtaining Government contracts in order to offset unevenness in its commercial business, but had no one on the company payroll with background [fol. 268] and experience in the field of Government procurement.

PROCUREMENT OF CONTRACT 1213— CONTINGENT FEE PROBLEM

3. *Entry of Norris and Tucker, Jr.* Unknown to plaintiff, the Government had put under surveillance the activities of a group known as Harry K. Tucker Associates, comprising Harry K. Tucker, Sr., and his son, Harry K. Tucker, Jr., in connection with suspected statutory violations in their contingent fee arrangements for services rendered contractors in procuring Government supply contracts. (Hereafter, use of the name "Tucker" shall denote Tucker, Jr., unless the contrary is indicated.) James S. Norris, who had been general manager of an eventually defunct machine shop, met Tucker in September 1952 and they decided to pool their talents in a company which would render "sales and engineering" assistance to clients of Tucker. In late September or early October 1952 Norris met for the first time with Sidney Cohen, Secretary-Treasurer of the plaintiff company, to ascertain plaintiff's interest in bidding on the manufacture of some apparatus. In this meeting Cohen was asked if he would be interested in engaging a salesman to secure commercial and Government production contracts. In consequence Tucker visited Cohen several times and there were negotiations for his services and those of

Norris. It was decided at the instigation of Norris and Tucker that Acme would set up a separate division to handle Government contracts in the metals field, that Norris would manage the operation, and Tucker would contribute his "know-how" in procuring and administering Government contracts and in expediting subcontract operations. Plaintiff's officers had not known Tucker prior to these events; however, plaintiff failed to ascertain who Tucker's other clients were or to ask them about the quality of his services.

4. *Informal hiring of Norris and Tucker.* At this stage the plaintiff informally agreed to hire Tucker and Norris. Tucker was to be paid 3 percent commission—to be divided equally between Tucker and Norris—on all business he procured, with a minimum salary guarantee against which his commissions would be applied. Tucker and Norris were to manage the plaintiff's proposed new [fol. 269] division. Norris began work at the Acme plant in Oreland, initially on an unpaid test basis, and his first duties were to estimate the bids, etc., in response to invitations which Tucker would procure for the plaintiff.

5. *Tucker's employment contract.* Plaintiff entered into a one-year employment contract with Tucker, dated October 13, 1952, whereby he and/or his "organization" agreed to serve as a "bona fide sales agent" on a parttime basis and be paid initially a weekly minimum salary of $150 which, starting 45 days after the initial delivery date in contracts procured by him for Acme, would be increased to equal the sum of (1) 5 percent of weekly gross sales up to $10,000 generated by him and (2) 3 percent of weekly gross sales in excess of $10,000. Minimum salaries paid prior to any sales being made were to be deducted later from the excesses of his commissions over his minimum weekly guarantee. The net effect of the arrangement was that the guaranteed weekly salary was an advance against commissions, and Acme could cancel the contract if commissions did not cover the minimum salary guarantee. The contract defined Tucker's services to include solicitation of invitations from both commercial firms and the Government. Tucker represen-

ted in the contract that he had no special connections of any kind with any Government departments. He agreed to assist in preparing price breakdowns and in planning of shop production methods, as well as in the collection of invoices if requested, in obtaining contract financing, and in locating materials, although the contract stated explicitly that it could not be canceled for failure to perform any of these duties not involving solicitation. The contract specifically provided that Tucker represented and would continue to represent other persons and firms having dissimilar lines of business. Norris nad Tucker also entered into an agreement with each other that Tucker would pay Norris 50 percent of any money to be paid Tucker by his clients for procuring work for them from Acme.

6. *Tucker's early services.* After the hiring of Tucker plaintiff experienced a pronounced increase in inquiries, bid proposals and bid invitations from both commercial and Government sources, thus increasing Cohen's confidence in his judgment in hiring Tucker. Tucker's services the first few months included investigations to de- [fol. 270] termine prior bid prices, solicitation of bid invitations, securing quotations from subcontractors, locating applicable specifications, and liaison work with the Philadelphia Ordnance District (hereafter POD).

7. *Plaintiff's bid.* On October 17, 1952, Tucker submitted to plaintiff information concerning the subject contract to be awarded by the Army Ordnance Corps for 2,322 75 mm. recoilless rifles, M-20. Tucker assisted in the preparation of plaintiff's bid estimate. Acting on Tucker's advice that a bid of $350 per rifle would probably insure an award as low bidder, Acme submitted its bid (signed by Norris) to POD on October 23, 1952, at a unit target price of $337.31 per rifle (later corrected to $337.23), subject to upward or downward price revision, with a ceiling price of $365.41 (later corrected to $384.95). Deliveries were proposed starting in March 1953 and finishing January 1954. Two other bidders in that district submitted bids at unit prices of $484.05 and $930.16, respectively. Two other bidders from outside the district submitted bids at unit prices of $423

and $684, respectively, one of them (Firestone) being an experienced manufacturer of the 75 mm. rifle which was then producing them at a contract unit price of $452.60. Plaintiff was thus considered to be the low bidder, although its bid on accessories under the invitation was not as low as one of the other bidders.

8. *Representations as to contingent fees.*

(a) In its original bid dated October 23, 1952, for Contract 1213 Acme, under the certification of James S. Norris as General Manager of the Defense Work Department, answered in the negative that part of the form requiring the contractor to represent whether it has or has not (boxes were supplied against each of the alternatives for inserting a mark to denote the correct fact) "employed or retained a company or person (other than a full time employee) to solicit or secure this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer." Under a revised proposal of December 10, 1952, also signed by Norris, it was instead represented that Acme "has * * * employed or retained a company or person (other than a full-time employee), to solicit or secure this contract and agrees to furnish information relating thereto as requested by [fol. 271] the Contracting Officer." However, under date of December 18, 1952, Joshua Epstein, president of Acme, executed a Government form entitled "Contractor's Statement of Contingent or Other Fees", in which he reverted to the company's position on October 23 by filling in one of the two alternative boxes to indicate that Acme "has not employed or retained a company or person (other than a full-time employee) to solicit or secure this proposed Contract No. —— and agrees to furnish information relating thereto as requested by the Contracting Officer."

(b) Within a roughly contemporaneous period (November 4, 1952 to January 5, 1953), plaintiff submitted bids on three other Army Ordnance contract invitations to the Rock Island Arsenal, and in these bids it disclosed the fact that it had retained someone other than a full-time employee working solely for the plaintiff. On or about December 12, 1952, plaintiff furnished the Rock

Island Arsenal with a form 119 (Contractor's Statement of Contingent or Other Fees), to which was attached a copy of its October 13, 1952 employment contract with Tucker; the submitted contract did not, however, disclose the fee-splitting arrangement made by Tucker and Norris. Rock Island Arsenal was thus on notice of the Tucker employment on a part-time basis. There is no evidence that POD had any more than imputed knowledge of it, since it administered the contract to which the form 119 related (see next paragraph). The disclosure provided the Office of the Chief of Ordnance in Washington with its first indication that Acme had an employment relation with Tucker whose 5 percent activities had excited official interest for some time past.

(c) One of the plaintiff's three bids referred to in the preceding paragraph ripened into the award to Acme on January 7, 1953, of Contract No. DA-11-070-ORD-8580 (hereafter referred to as Contract 8580), which was executed by the Rock Island Arsenal but was administered by POD. Contract 8580 is the subject of another pending action by the plaintiff in this court in Court of Claims No. 538-59. It bears the plaintiff's statement that it "has employed or retained a company or person other than a full-time employee) (working solely for the bidder) to solicit or secure this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer."

[fol. 272] (d) Prior to award of the contract in suit to plaintiff, Army Ordnance headquarters had information relative to the contingent fee activities of the Tucker father and son team, but to what extent this information was in the possession of POD personnel who were negotiating with plaintiff is not known. Certain POD personnel apparently had some information concerning Tucker, Sr., because they advised plaintiff of its possible mistake in employing the son of a man suspected of so-called "five-percenter" activities, but plaintiff had no other factual basis for imputing the father's delinquinces to the son and so ignored the advice. At the request of one of the POD negotiators the plaintiff submitted a certification, dated December 18, 1952, that it "has not employed

or retained a company or person (other than a full-time employee) to solicit or secure this proposed contract * * *".

(e) Under date of May 8, 1953, in response to defendant's request for a proposal for an additional quantity under the contract in suit, the plaintiff signed a warranty that it "has not," retained anyone, etc.

(f) On May 18, 1953, Acme advised POD by letter as follows:

> In answer to the question that has arisen about the status of our Mr. Harry K. Tucker, Jr. please be advised that as of January 1953 Mr. Tucker has gone on a full time basis with this company, acting in the capacity of Sales Manager.
>
> The original part-time salary employment contract with Mr. Tucker was cancelled, and any commissions or percentages due him under this original agreement were also cancelled. He is not now, or has in the past collected any commissions on any prime contract or sub-contract, or commercial work that he has obtained for us in the past or in the future.
>
> We will appreciate your notifying Rock Island Arsenal and withdrawing a Form W119 which was filled out by Acme showing that Mr. Tucker was being paid a commission on the three contracts we now have with Rock Island Arsenal.

Although this letter states that Tucker was employed on a full-time basis in January 1953, the contract providing for his full-time employment was executed on March 18, 1953, effective as of March 2, 1953 (see finding 9(b). [fol. 273] (g) There is no evidence that Tucker used any corrupt or improper influence in obtaining Contract 1213 for the plaintiff.

9. *Modification of Tucker's contract.*

(a) With the award of the contract in suit to Acme on January 27, 1953, the demands on Tucker's time increased. From some time in February 1953 Tucker devoted the major part of his time to administration of Contracts 1213 and 8580 for plaintiff, including the procurement of subcontracts, expediting of parts and sup-

plies, and liaison with POD. In the meantime he also solicited new business for Acme and assisted in the preparation of bids on this new business. What proportion of his time ostensibly devoted to the interests of Acme was actually occupied in his reprehensible secret deals with subcontractors as described in findings 22 through 24, *infra*, is not known.

(b) Commencing the week ending March 7, 1953, Acme increased its weekly payment to Tucker to $300. By an agreement of March 18, 1953, effective March 2, superseding all prior agreements, Acme hired Tucker and Norris on a full-time salary basis at $300 each per week. Each was to receive in addition 25 percent of the annual net profits of the Lansdale operation and, after Acme had recouped its Lansdale investment "all assets created by the Lansdale plant * * * will be owned by the partnership, or Acme and Norris-Tucker." The purpose of this agreement was to provide incentive to Tucker and Norris to build up this new department of Acme's business. Tucker's salary was reduced to $250 per week on October 11, 1953. Throughout his employment by Acme, Tucker was compensated on the basis of his weekly guarantee, whether or not it was denominated as an advance against commissions, and deductions were duly made from each such payment for social security and withholding taxes.

10. *Negotiations.* Acme's bid of October 23, 1952 (finding 7, *supra*) did not contemplate that the Government would furnish any financing or Government-owned production machines. On December 3, 1952, POD requested plaintiff to file a revised bid containing complete cost breakdowns and a list of proposed subcontractors, which was done December 12. The revised bid proposed a two-month overall postponement of the delivery schedule. [fol. 274] Meetings between POD personnel and Acme representatives (most frequently Norris and Tucker) were held from December 11, 1952, onward to discuss various aspects of the contract, including price, which POD felt to be quite low in comparison with other bids, but reasonable and attainable nevertheless in the light of the delivery schedule, subcontracting plans, and other factors then known to POD. Moreover, POD was influenced in favor of Acme because it would then be the only

small business concern in the country manufacturing the recoilless rifle, and could possibly develop into an additional source of supply for the 20 mm. gun. POD was concerned, however, over plaintiff's ability to produce an item foreign to its experience and at an admittedly low price, and offered Acme an opportunity to withdraw its bid, which plaintiff refused.

11. *Request for Government machinery.* Acme had planned to subcontract the rifling phase of the proposed contract. When the rifling subcontractor withdrew its quotation Acme advised the defendant, on January 13, 1953, that if it could obtain the necessary rifling and honing equipment either from Army Ordnance sources or elsewhere it would undertake to perform the rifling phase of the contract itself. At this time Acme also advised the defendant that it would manufacture the vent-assembly component in its own shop rather than subcontract it as planned, and gave information as to certain subcontracts which had been let, including one for the chamber assembly which had been tentatively subcontracted to All Metals Industries, Inc. Acme was then making arrangements to obtain the equipment and machinery necessary to perform those parts of the contract which it did not plan to subcontract. On January 20, 1953, Acme requested the use of two government-owned rifling machines, two lathes and two honing machines, which it estimated would cost $15,000 and take about ten weeks to repair and install. Acme assured POD that no V-loan would be necessary for contract financing because it had other access to funds, and requested a small increase in the ceiling price. On January 23, 1953, the Board of Awards at POD, contrary to the recommendation of POD negotiators, rejected Acme's bid because the delivery schedule calling for initial deliveries in May 1953 was too optimistic.

[fol. 275] 12. *Availability of Government machinery.* Following the rejection of Acme's bid by the Board of Awards a series of meetings were held at POD attended by representatives of POD, Acme and All Metals. POD announced the availability to Acme of government-owned machinery requested by Acme capable of producing in excess of Acme's delivery schedule if properly set up and

tooled. It was recommended by the Philadelphia Regional Office representative of POD that the contract be awarded to Acme.

CONTRACT AWARD AND MODIFICATIONS

13. *Description.* Under date of January 27, 1953, negotiated Contract No. DA-36-034-ORD-1213(R) (hereafter referred to sometimes as Contract 1213) was awarded to plaintiff by POD, requiring plaintiff to manufacture and deliver 2,322 75 mm. recoilless rifles, M-20, at a unit target price of $337.23 (total $783,048.06), plus 24 sets of accessories, tools and equipment at a target price of $3,787 per set (total $90,888), all subject to limited price revision upward upon delivery of 30 percent of the rifles. The original contract provided for deliveries as follows:

Month Required:	*Item 1: Rifles*	*Item 2: Sets*
May	74	1
June	233	2
July	234	2
August	233	2
September	233	2
October	234	2
November	233	2
December	233	2
January	234	3
February	233	3
March	148	3
Total	2,322	24

Subsequent modifications to the contract up to May 7, 1954 resulted in various adjustments of quantities and prices, the total quantity finally required being 2,751 recoilless rifles, plus tools, accessories and parts at a total contract target price of $1,043,918.72. The modifications included changes in certain delivery schedules, provision for use of specific government equipment and machinery, agreements adjusting prices on items not meeting specification requirements, and the addition of spare parts to the procurement. Where these modifications are relevant [fol. 276] to the consideration of particular developments

in contract performance they will be referred to specifically at the appropriate parts of these findings.

14. *Deliveries, scheduled v. actual.* The delivery schedules required by the contract as revised by supplements thereto, and the actual deliveries by the plaintiff, are shown in the following schedule:

DELIVERY SCHEDULES AND ACTUAL DELIVERIES

	Contract 1213 (R)		Supp. 3 (6/23/53)			Supp. 7 (1/25/54) Item 1	Supp. 9 (3/24/54)		*Actual Deliveries*	
	Item 1[1]	Item 2[1]	Item 1	Item 2	Item 3[1]		Item 2	Item 3	Item 1	Cum. (Total)
1953										
Apr.	------	------	------	------	------	------	------	------	2	(2)
May	74	1	------	------	------	------	------	------	------	(2)
June	233	2	30	------	------	30	------	------	30	(32)
July	234	2	125	1	------	125	[2]	------	2	(34)
Aug	233	2	233	2	------	------	------	------	113	(147)
Sept	233	2	233	2	------	60	------	------	------	(147)
Oct	234	2	233	2	------	133	------	------	137	(284)
Nov	233	2	233	2	------	133	------	------	100	(384)
Dec	233	2	233	2	------	100	------	------	62	(446)
1954										
Jan.	234	3	233	3	------	100 (minimum)	------	------	106	(552)
Feb.	233	3	233	3	------	100 "	------	------	100	(652)
Mar.	148	3	233	3	------	100 "	[2]	------	49	(701)
Apr.	------	------	233	3	------	100 "	------	------	43	(744)
May	------	------	233	1	40%	100 "	------	------	104	(848)
June	------	------	233	------	50%	100 "	------	------	180	(1,028)
July	------	------	33	------	10%	100 "	------	------	135	(1,163)
Aug	------	------	------	------	------	100 "	------	------	------	------
Sept	------	------	------	------	------	100 "	------	------	------	------
Oct	------	------	------	------	------	100 "	------	------	------	------
Nov	------	------	------	------	------	100 "	------	------	------	------
Dec	------	------	------	------	------	100 "	------	------	------	------
1955										
Jan.	------	------	------	------	------	100 "	------	------	------	------
Feb.	------	------	------	------	------	100 "	------	------	------	------
Mar.	------	------	------	------	------	100 "	------	------	------	------
Apr.	------	------	------	------	------	100 "	------	------	------	------
May	------	------	------	------	------	100 "	------	------	------	------
June	------	------	------	------	------	100 "	------	------	------	------
July	------	------	------	------	------	100 "	------	------	------	------
Aug	------	------	------	------	------	100 "	------	40%	------	------
Sept	------	------	------	------	------	100 "	------	50%	------	------
Oct	------	------	------	------	------	70 "	------	10%	------	------

[1] Item 1 refers to rifles, Item 2 to accessories, Item 3 to parts.
[2] "All line items for Item 2 shall be delivered on or before 31 July 1953 except that the 2,400 Rammers and 2,400 Fuze Wrenches shall be delivered by March 31, 1954."

15. *Contract provisions.* The contract contained the standard clauses for Changes, Assignment of Claims, Default, Covenant Against Contingent Fees, Termination for Convenience of the Government, and Disputes. In addition it contained the following provisions:

[fol. 277] 4. FACILITIES: In the performance of this contract the Contractor shall have the right to use the facilities listed in the FACILITIES CONTRACT between the parties numbered DA-36-034-ORD-1214F, subject to the terms thereof; and the unit prices of this supply contract are based on such use.

* * * *

10. LIQUIDATED DAMAGES: ½ of 1% of the contract price of undelivered units for each day's delay after the date or dates specified for deliveries hereunder.

The following paragraphs shall be added to General Provision No. 11, DEFAULT, of Standard Form 32, and Paragraph (f) contained therein is hereby deleted:

(f) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and therefore in lieu therof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay the amount set forth elsewhere in this contract; provided that the Government may terminate this contract in whole or in part as provided in paragraph (a) of this clause, and in that event the Contractor shall be liable, in addition to the excess costs provided in paragraph (c) above, for liquidated damages accruing until such time as the Government may reasonably provide for the procurement of similar supplies or services. The Contractor shall not be charged with liquidated damages when the delay arises out of causes beyond the control and without the fault or negligence of the Contractor, as defined in paragraph (b) above, and in such event, subject to the clause of this contract entitled "Disputes," the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance when in his judgment the findings of fact justify an extension.

(g) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

* * * *

12. OVERTIME: No overtime work in excess of the six (6) day, eight (8) hour week shall be performed in this contract by employees of the Contractor without prior approval of the Contracting Officer except for such overtime as is necessitated by disaster, emergency or to complete heat cycles.

[fol. 278] 13. SPECIAL TOOLING: The *unit price* for Item 1 includes therein $14.00 as the estimated cost of special tooling.

* * * *

20. COVENANT AGAINST CONTINGENT FEES: The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

* * * *

GENERAL PROVISIONS

(Supply Contract)

* * * *

31. GRATUITIES (O.P.I. [Interim] 64-51)

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of enter-

tainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing, of such contract; provided, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages of which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than 3 nor more than 10 times the [fol. 279] costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

* * * *

35. GOVERNMENT-FURNISHED PROPERTY (ASPR 13-502)

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property which the schedule or the specifications state the Government will furnish (hereinafter referred to as "Government-Furnished property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-Furnished property of a type suitable for use will be delivered to the Con-

tractor at the times stated in the schedule or if not so stated in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-Furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, if requested by the Contractor, make a determination of the delay occasioned the Contractor thereby, and shall grant to the contractor a reasonable extension of time in respect of such delivery of performance dates. The Government shall not be liable to the Contractor for damages or loss of profit by reason of any delay in delivery of or failure to deliver any or all of the Government-Furnished property, except that in case of such delay or failure, upon the written request of the Contractor, an equitable adjustment shall be made in the delivery or performance dates, or prices, or both, and in any other contractual provision affected thereby, in accordance with the procedures provided for in the clause of this contract entitled "Changes".

* * * *

36. SPECIAL TOOLING (ASPR 13-504)

* * * *

37. *Price Redetermination* (Form II-B).

(a) The prices stated herein may be increased or decreased in accordance with this clause. In no event shall the revised price exceed 115% of the Unit Price, as amended, of item 1 plus 110% of the Unit Price, as amended, of item 2

[fol. 280] (b) *Times for negotiation.*

(1) Upon completion of delivery of 30% percent of item 1 to be furnished under this contract or upon expenditure of—percent of the total contract target amount, whichever shall occur last, the parties shall negotiate to revise the prices of all items theretofore and thereafter to be delivered. Within 30 days after the completion of delivery or expenditure of funds referred to above, the Contractor shall furnish to the Contracting Officer the Statements and data referred to in paragraph (c) of this clause. * * *.

THE LANSDALE PLANT

16. *Locating Lansdale facility.* Norris and Tucker had recommended to plaintiff that its home plant at Oreland would be unsuitable for performance of Contract 1213, and advised that a separate plant should be established to handle Government contracts. Sidney Cohen of plaintiff company located a factory at Lansdale, Pennsylvania, which had been used as a hosiery mill, one-quarter of which was still occupied for that purpose. Plaintiff made arrangements to lease the available portion of the Lansdale plant for operation as its proposed Defense Works Division. Norris was placed in charge of operations as general manager of production, and as such was authorized to submit bids, sign Government contracts, award subcontracts, and hire and fire personnel. Tucker was put in charge of sales, Government contracts, and expediting and coordinating subcontractors. On January 8, 1953, Norris wrote to POD furnishing a layout of the Lansdale facility, describing its personnel and equipment, and stating in part as follows:

> As further explained to Mr. Karam and Mr. Oschwald, Acme has already invested many thousands of dollars in setting up an additional organization, specifically familiar with engineering, manufacturing and expediting of National Defense items, including the investment of many thousands of dollars in the new building at Lansdale, Pennsylvania, along with the necessary equipment, placing itself in a position to immediately perform on this contract, when awarded. Of note is that Acme is an established manufacturing concern, which is extending its facilities and capacity to include defense type manufacturing, and we feel the broadening of our facility not only is valuable to us, but also to our National needs.

[fol. 281] 17. *Lease of Lansdale plant.* On January 23, 1953, Acme leased that portion of the Lansdale plant which was not occupied by the existing tenant and was given the right, *inter alia*, "* * * to install steel plates on the floor for the purpose of properly supporting any of its machinery * * *."

SUBCONTRACT TO ALL METALS

18. *Services contract with Tucker.* All Metals Industries, Inc., was established in July 1951 at Latrobe, Pennsylvania, as a small machine shop. Its stock was owned equally by John Hopkins, its president, Edward G. Oppenheimer, its vice president, and by Leonard Morris. In the spring of 1952 All Metals learned collaterally that Tucker was for hire to solicit commercial and Government contracts. He was interviewed and his references checked. On October 1, 1952, All Metals entered into a written contract with Tucker for his services and agreed to pay him 5 percent of weekly gross sales up to $10,000 to customers procured by him, plus 3 percent above $10,000, with a minimum guaranteed weekly salary of $100 to be charged against commissions. The contract defined Tucker's services to include the solicitation of invitations to bid on commercial and Government contracts, preparation of price estimates on such invitations, rendering of advice as to production methods, collection of bills when requested, assistance in obtaining financing for performance of contracts which he might secure, and in locating materials. It provided for cancellation in the event of violation of contingent-fee provisions. All Metals eventually paid a total of $2,200 to Tucker under this contract.

19. *Procurement of Acme subcontract.* There is no record of Tucker's concrete accomplishments for All Metals in the form of business obtained through him until he informed All Metals of the possibility of securing purchase orders from Acme under Contracts 1213 and 8580. All Metals participated in some of the negotiation conferences between Acme and POD, which led to the award of Contract 1213 to Acme on January 27, 1953. On the evening of that day Norris and Tucker met with Oppenheimer and Hopkins of All Metals and Norris gave All Metals verbal assurance of giving it a subcontract to manufacture chamber and vent assemblies, which were components in the guns which Acme was to manufacture [fol. 282] under Contract 1213. The fact is disputed, but it is reasonable to conclude that at least as of January

27, 1953, Oppenheimer of All Metals knew that Tucker was Acme's agent, although the officials of Acme other than the conspirators were unaware that Tucker was serving simultaneously as agent for All Metals in procuring the subcontract. The only Acme personnel who were aware of Tucker's double agency were Norris, Jack Epstein (see finding 1, *supra*), Philip Chagnon, and, of course, Tucker himself. By Acme purchase order No. 35986, dated February 2, 1953, All Metals was issued a subcontract for the production of 2,322 chambers and vent assemblies at unit prices of $71.29 (target) and $81.64 (ceiling) for the chambers, and $51.66 (target) and $58.93 (ceiling) for the vent assemblies. The subcontract contained the following clauses:

> CONTINGENT FEES: Seller warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give Buyer the right to annul this contract, or, in its discretion, to deduct from the contract price or prices the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by Seller upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by Seller for the purpose of securing business.
>
> CANCELLATION: (b) Buyer also reserves the right at any time whenever the prime contract is cancelled to cancel this order, or any part thereof, by written notice to Seller, even though Seller is not in default hereunder, and this order is subject to all the terms and conditions of the usual standard form of provisions of clauses providing for the termination of supply contracts for the convenience of the Government, and to all the terms and conditions of any prime contract to which this order relates. Thereupon Seller shall, unless the notice otherwise specifies, discontinue all work and the placing of orders hereunder and shall cancel all existing orders and subcontracts. Upon such cancellation settlement of any

amounts due the Seller shall be in accordance with such equitable settlement of any approved and allowed by the Government as being reimbursable to the Buyer under the prime contract. Buyer shall be under no liability for the payment of such settlement until it receives from the Government approval and
[fol. 283] allowance of Seller's claim in respect of such settlement.

The subcontract price included latently the sales commission due Tucker from All Metals.

20. *The "shakedown"*. On or about February 17, 1953, Hopkins and Oppenheimer of All Metals were advised by Tucker and Jack Epstein (then superintendent of Acme's Oreland plant and son of its president, Joshua Epstein), that All Metals' purchase order 35986 from Acme would be canceled unless All Metals paid Jack Epstein $25,000 in cash. Jack Epstein falsely represented himself to be a vice president of Acme and Oppenheimer assumed erroneously that he had the power to cancel the subcontract and that Joshua Epstein was implicated, neither of which assumptions was true. Oppenheimer assumed that it was an "income tax dodge" of some kind. On the protest of Hopkins and Oppenheimer that All Metals was not financialy able to meet this demand, Tucker and Jack Epstein suggested that, as an alternative, All Metals should let a contract for $23,500 to Gunn Engineering Company for "engineering services", while Acme's subcontract to All Metals would be increased commensurately. This alternative proposition had been cleared by Tucker and Jack Epstein with Norris beforehand. Gunn Engineering Company was a dummy corporation which had been organized on or about February 16, 1953, and was owned by Tucker, Norris and Jack Epstein, without the specific knowledge of Acme's officers until around the time of the cancellation of Acme's Contract 1213 in August 1954. All Metals accepted the alternative proposal under economic duress, and on February 18, 1953, All Metals issued a purchase order to Gunn Engineering Company for "Consulting Engineering Services and Tool Design as Per Verbal Agreement" for a price not to exceed $23,500 payable in installments. On the same day Acme issued purchase or-

der 36108 to All Metals for chambers and vent assemblies which superseded the earlier purchase order of February 2 and increased the vent assembly prices by $10 per unit to cover the amount extorted from All Metals as related above. Through May 5, 1953, a total of $12,000 was paid by All Metals to Gunn Engineering Company by [fol. 284] check. Needless to say, Gunn Engineering Company rendered no services whatsoever to All Metals.

21. *Effort to expunge consequences of Gunn purchase order.*

(a) Following the May 5, 1953 installment paid by All Metals to Gunn, Tucker instructed All Metals to discontinue further payments, which All Metals did. In June 1953 Tucker told Oppenheimer that Norris was under official investigation and that he wanted to clear up the situation and cancel certain transactions that had been entered into. Principally Tucker wanted to erase the effect of the "shakedown" transaction narrated in finding 20, *supra*, and to create an appearance that he had not been All Metals' paid agent during the shakedown period.

(b) To accomplish this, on or about June 25, 1953, Tucker gave All Metals a letter predated February 10, 1953 terminating his services contract with All Metals as of that date. Having previously in March 1953, for obscure reasons, assigned this services contract to one Philip Chagnon, who immediately reassigned it to Gunn, on June 25 by means of a "Release and Acknowledgement" backdated to March 20, 1953, Tucker canceled and voided these assignments. Oppenheimer then canceled by letter All Metals' purchase order of February 18, 1953 to Gunn. In furtherance of the fiction, Oppenheimer drafted a letter which he wanted Acme to send to All Metals, and sent this to Tucker's residence with a covering letter. Under date of June 30, 1953, this letter on Acme's letterhead (composed as stated by Oppenheimer) was sent by Norris to All Metals. It purported to reduce retroactively by $11.50 per unit the price in Acme's second purchase order (No. 36108) to All Metals, which, as has been described, had increased the first purchase order by $10 as part of the "shakedown". Since by this time All Metals had al-

ready delivered and billed Acme for one shipment (four units) under the second purchase order at the inflated price, the letter of June 30, 1953 from Acme provided that a credit memorandum would be issued to Acme for $202.71, $41.04 of which represented the inflationary element in the invoice for the first shipment. Also, on June 30, 1953, a supplement was issued by Norris to Acme purchase order 36108 reducing the unit price of vent assemblies by $11.50, and halving the quantity of vent assem- [fol. 285] blies. On August 15, 1953, Acme paid the June 3 All Metals' invoice after deducting the credit, and thereafter all invoices submitted by All Metals to Acme for completed shipments were paid at the corrected prices. All Metals corrected its books of account to reflect these price readjustments. As of June 30, 1953, its books carried as an uncharged expense the $12,000 which it had paid to Gunn up to May 5, and it was not charged in the books to the Acme subcontract for chambers and vent assemblies. All Metals' accountant testified that the $12,000 was not included as a contract cost by All Metals directly or indirectly in either its original cost submission for termination purposes to the Army or in the damage schedule filed in the instant proceeding for audit under former Rule 28.

(c) The defendant concedes that by its revision of the second purchase order from Acme, All Metals reduced its price to less than the price in the first purchase order, but contends that the method of computation employed by Oppenheimer and Tucker in arriving at the amount of the reduction left in the ultimate cost figures the $12,000 which All Metals had paid to Gunn, so that its final price to Acme and its claim to the Government necessarily included a kick-back element in violation of the statute. Thus, the method of computation was as follows:

The sum as yet unpaid by All Metals to Gunn under the bogus purchase order was $11,220 (i.e., $23,220 less $12,000 already paid). This $11,220 was added to $15,487.74 (the 5 percent commission due Tucker for procuring the purchase order from Acme), and the resulant total of $26,707.74 was deducted from the price

in the second purchase order No. 36108, thus providing a basis for a new unit price by dividing the number of units into the reduced total.

(d) The facts from which the parties reach opposite contentions are correct as stated. If we refer to the successive purchase orders from Acme to All Metals as the first, second and revised in the order of their issuance, it appears that the prices charged by All Metals in the first and second purchase orders included latently Tucker's commission, but the revised purchase order did not. The amounts paid to Gunn by All Metals were buried in the cost structure of the second and revised purchase orders but not in the first one. Since there is no evidence that [fol. 286] All Metals made any effort to recover the $12,000 exorted from it by Gunn, it is concluded that, in its final cost structure on which its ultimate revised price to Acme was based, All Metals included the $12,000 paid to Gunn in exchange for a waiver by Tucker of the $15,487.74, which was technically owed him [1] for commissions and which had been indirectly included in All Metals' cost structure underlying its initial price to Acme.

TUCKER'S DUPLICITOUS AGENCY FOR OTHER SUBCONTRACTORS

22. *Manalapan.*

(a) On November 10, 1952, Tucker entered into an agreement with Jaime Kohan, trading as Manalapan Machine & Welding Works, whereby for a minimum six-month period Tucker was to be employed on a non-exclusive basis as sales representative to secure contracts for Manalapan to perform at a minimum weekly salary of $100 which was to be applied against commissions earned on business brought in. Tucker took Kohan to see Norris at the Acme plant to look over some blueprints for a potential subcontract. After some negotiations and the rejection by Acme of an initial price which was too high,

[1] As stated in paragraph (a) of this finding, Tucker's assignment of his 5 percent commission to Gunn was canceled, so that as of June 1953 All Metals was technically indebted to Tucker for commissions.

Manalapan was given a series of purchase orders by Acme relating to the latter's Contract 1213 during the period from February 1953 to July 1953. Only a portion of Manalapan's various quotations were accepted. Some of the parts it furnished to Acme were unsatisfactory and required reworking. Manalapan's prices to Acme included latently amounts paid by Manalapan to Tucker under the employment agreement described above. Pursuant to the employment agreement Manalapan paid Tucker $428.50 from November 21, 1952 to December 29, 1952 (which was prior to Manalapan's purchase orders from Acme) and $1,350 from February 16, 1953 to May 15, 1953 (which was during the performance by Manalapan of its purchase orders from Acme). Tucker shared these payments with Norris pursuant to their agreement. Not all of the work which Manalapan received from plaintiff was the [fol. 287] result of Tucker's efforts, for after the discontinuance of Tucker's agency for Manalapan it received requests from Acme for quotations.

(b) There is some confusion between Jaime Kohan, trading as Manalapan Machine & Welding Works, and a corporation by the name of Manalapan Machine Works, Inc., organized January 2, 1953. Jaime Kohan had no financial interest in this corporation but eventually served as its superintendent. His son was a principal in the corporation. The corporation received and performed some of Acme's purchase orders until November 1953, when it discontinued due to lack of funds. Other purchase orders were received and performed in the name of the individual proprietorship. Thereafter, at Acme's request and with the consent of the Manalapan Machine Works, Inc., Jaime Kohan, trading as Manalapan Machine & Welding Works, continued the work under the corporation's purchase orders until they were canceled. Acme treated both of the Manalapan companies interchangeably as a single legal entity. The corporation did not file a claim with the defendant, but the individual proprietorship did. The payments to Tucker described above were made by the individual proprietorship.

(c) Jaime Kohan of Manalapan knew or should have known that Tucker was an employee or agent of Acme at the time of their relations described above. The officers of

Acme (as distinct from Norris, Tucker, Jack Epstein and Chagnon) did not know until after cancellation of Contract 1213 that Tucker was a paid agent for Manalapan.

23. *Foley Machine Company.* Foley Machine Company had been doing business for several years with Tucker, Sr., the father of Tucker, Jr. Norris and Tucker, Jr., had formed the Neptune Manufacturing Company, Inc. Foley knew that Neptune was Tucker's company. On January 24, 1953, Foley contracted on a contingent basis with Neptune for the latter's services in securing subcontracts from Acme, agreeing to pay it 5 percent of the gross amount of all orders or business which Neptune might get for Foley from Acme, with a weekly drawing account of $75 to be applied against commissions. Thereafter, Foley met with Tucker at the Acme plant to review the prints under the 1213 contract. At that time Foley knew or should have known that Tucker was an employee [fol. 288] or agent of Acme. On February 10, 1953, Acme issued a purchase order to Foley under its Contract 1213. Foley sent two checks to Neptune for $75 each, dated February 12 and 19, 1953. By a document dated February 27, 1953, and signed by Tucker, the contingent fee agreement of January 24 between Neptune and Foley was canceled. The two checks referred to above, which had not been deposited by Neptune, were returned to Foley. Defendant contends that Acme included the contingent fees paid to Neptune by Foley in its schedule of costs filed in this court pursuant to former Rule 28, that the contingent fee which Foley had agreed to pay Neptune constituted an improper and illegal cost and expense incurred or paid by plaintiff and/or Foley, and that it constituted an illegal kickback under 41 U.S.C. 51. Undoubtedly, the price charged by Foley to Acme in the purchase order included latently an amount sufficient to pay the contingent fee. The officers of Acme (as distinct from Norris, Tucker, Jack Epstein and Chagnon) did not know until after cancellation of Contract 1213 that Tucker and Norris were paid agents for Foley through the medium of Neptune.

24. *Nicholson Products Company.* In June 1952 Nicholson Products Company entered into an agreement with

Tucker, Sr., hiring him at a minimum salary of $200 per week for his services in procuring customers. The agreement provided for an eventual increase in compensation to equal 5 percent of weekly gross sales up to $20,000 and 3 percent over that from all new business for which Tucker, Sr., was responsible. Through arrangements made by Tucker, Sr., Nicholson's president visited Norris at Acme to obtain details of a subprocurement. Nicholson then obtained some subcontracts from Acme under Contract 1213 and paid commissions to Tucker, Sr., on such subcontracts. There is no evidence that any responsible officers of Acme were aware of this matter.

25. *Johnson and Kunz.* After Norris was hired by Acme as general manager of the Lansdale plant he hired as his assistant at $150 per week one Philip Chagnon, who had been associated in previous business relations with Norris since 1944. Chagnon performed some expediting work but his duties for Acme were principally [fol. 289] clerical in nature. He entered into a private agreement with the firm of Johnson and Kunz to be paid a commission on any business he obtained for the latter. At Chagnon's recommendation Norris awarded a subcontract to Johnson and Kunz under Acme's Contract 1213. Johnson and Kunz paid commissions of $900 to Chagnon by checks made out to a mythical Robert Skillman, Chagnon's pseudonym. The checks were endorsed and cashed by Chagnon. No other Acme employee was aware of Chagnon's private commission arrangement. He used a pseudonym as a cover because he understood that the Federal Bureau of Investigation had commenced an investigation of certain aspects of Acme's performance under Contract 1213.

DEPARTURE OF THE CONSPIRATORS

26. *Norris.* From May to July 1953 Norris used several Acme employees to perform work on his farm, charging the labor cost of $895.52 and travel expenses of $150 against Contract 1213 on Acme's books. This matter was brought to the attention of Joshua Epstein, Sidney Cohen and Jack Epstein of Acme by an FBI agent who had in-

vestigated it. They disclaimed prior knowledge of it. Jack Epstein recommended that the labor costs should be charged against Norris' account and thus credited to Contract 1213 to remove the charge, but this was not accomplished. On September 4, 1953, Norris was discharged with the following letter from Joshua Epstein:

> We are obliged to advise you that your services will this company are terminated immediately because of:
>
> A. Your improper conduct and unauthorized expenditures, involving contracts with agencies of the United States Government, which resulted in your being investigated by the Federal Bureau of Investigation;
>
> B. Your voluntary abandonment of your duties, without excuse or permission;
>
> C. Other reasons well known to you, not necessary to relate in detail.
>
> We are making formal demand for reimbursement of all unauthorized withdrawals, or improper charges for salaries, moneys, value of materials or otherwise.

On September 11, 1953, Acme wrote to POD requesting the correction of the latter's records showing Norris' elim- [fol. 290] ination as General Manager and his replacement by Jack Epstein as plant superintendent.

27. *Tucker.* Effective October 17, 1953, Acme reduced its weekly payment to Tucker to $250, and effective the week ending November 11, 1953, Tucker's services with Acme were terminated for reasons which are not specified in the record.

28. *Chagnon.* At the end of November 1953 Chagnon left Acme's employ.

29. *Epstein.* On November 23, 1953, Jack Epstein executed a false affidavit that at no time had he received any commission, etc., from any Acme subcontractor or supplier in connection with Government contracts. On August 28, 1954, he resigned from Acme.

30. *Knowledge of Joshua Epstein.* POD had advised Joshua Epstein on several occasions prior to the removal of Norris and Tucker that Tucker, Sr., was known to be a five-percenter in Government contract circles and that it was risky to hire his son, Tucker, Jr. Joshua Epstein did not consider this advice to be worthy of reliance, and as late as June 1955 asserted that he had found Norris and Tucker to be willing and competent workers and that their hiring had been justified. From the circumstances related in findings 26 through 29, *supra*, relative to the removal of the conspirators from Acme's payroll, particularly the inferences contained in the letter discharging Norris (finding 26, *supra*) and the contents of Jack Epstein's affidavit (finding 29, *supra*), it is reasonable to conclude that during the late summer and fall of 1953 some information had come to Joshua Epstein's attention leading him to suspect that the conspirators (including his son) had engaged in some improper activities. Rather than expose the culprits he induced their removal for suspected cause. Joshua Epstein was not called as a witness in the trial of the instant case. Jack Epstein's delayed resignation is understandable in view of the relationship which existed.

31. *Prosecution of conspirators.* Tucker, Norris and Jack Epstein were indicted for violation of the Anti-Kickback Law (41 U.S.C. 51, 52, 54). On April 13, 1956, after presentation of the Government's case, the defendant's motion for acquittal was granted (see finding 54(j), *infra*. The court, *inter alia*, said:

> [fol. 291] * * * I may say that I have been shocked at the sordid picture that has been exhibited here in this case. I have never seen such an exhibition of disloyalty to an employer as has been exhibited in the actions of these three men.
>
> * * * the picture of a scheme set up, not only to increase the cost to the employer, but also to increase the cost to the United States, for a few paltry dollars, shows complete larceny in the hearts of these three defendants. They thought they were doing something crooked, and that is clear from the actions

they took in effectuating this scheme. The scheme was despicable and morally reprehensible, but unfortunately within the narrow letter of the law.

This statute, as I see it, does not cover the contract in this case. I am intellectually certain that this is not the type of contract that is covered by the Act of March 8, 1946, being Title 41, Section 51, of the Act. There is nothing that I have seen in any of the regulations or in the congressional history which would indicate to me that there was any intention on the part of Congress to cover this particular type of contract. It may well be that Congress thought that in this type of contract the employer would be the one that would protect the interests of the United States, but no employer can protect himself against treacherous employees who are determined to commit morally reprehensible acts and who, for the sake of a few paltry dollars, set up the type of vicious scheme that has been set up in this case, which resulted in increased cost both to the employer and to the United States.

Therefore, it seems to me that the proper remedy in this case is that if Congress so feels, it should expand the provisions of Title 41 to cover just this sort of machination on the part of trusted employees; and I am ordering that my remarks here be transcribed, filed of record, and that the United States Attorney be furnished two copies so that if he wishes he may transmit a copy of my remarks to the Attorney General of the United States, to the end that Congress may if it so desires amend this Act to include as a crime the vicious and immoral type of conduct that has been exhibited in this case.

This case clearly showed that the employer was victimized, and I would say indirectly the United States was also, but the defendants were narrowly within the law. I don't know what type of action the employer may take against these employees, but I do say that I have nothing but contempt for their actions. Unfortunately, they are without the purview of this particular statute.

[fol. 292]

ALLEGED IMPROPRIETIES INVOLVING GOVERNMENT EMPLOYEES

32. *Hochstuhl.*

(a) After Contract 1213 was awarded to Acme, Charles G. Hochstuhl of POD was assigned to administer it, along with a number of other contracts, under the immediate supervision of Harry Oschwald. In this capacity Hochstuhl journeyed to Ohio in March 1953 in the company of Acme officials to show them existing gun-manufacturing facilities. On his return to POD he submitted a voucher for his per diem and other trip expenses, and was paid the same. Adolph Gromada of Acme had paid $12.50 for Hochstuhl's hotel room charges on the trip, and this expense was charged by Acme against the contract in suit. On another occasion Acme charged against the contract hotel and meal charges for visitors, apparently Government employees, from Watervliet Arsenal. Hochstuhl's duties at POD in connection with Contract 1213 included recommending changes in the delivery schedule, for review by Oschwald.

(b) Hochstuhl was removed from his position with POD effective August 4, 1953 "* * * for making material false statements and exaggerations on your application standard Form 57", relating to some prior private employment. During his notice period he looked for other employment and was employed by Acme in August 1953 immediately after the termination of his employment at POD. POD advised Acme at the time, in Hochstuhl's words, that he "would be limited for a period of two years after being separated from the Government, which would restrict [him] in not negotiating any prices or any legal matters, any technical involvements of the contract, as a contractor's representative to any individual Government employee." If POD's advice to Acme was in writing it is not in the record.

During the first few weeks of his employment by Acme he helped Norris as an expediter of subcontracted components. After Norris was discharged in September 1953 and replaced by Jack Epstein as superintendent of the

Lansdale plant, Hochstuhl was appointed as Epstein's assistant. As such he was given a variety of assignments, all of them relating in one form or another to paperwork. He helped to establish a control system for subcontracted [fol. 293] work, correlated many details relating to Acme's several Government contracts, maintained quality control records, prepared letters to Ordnance from Acme for signature by others, correlated plant inspections by inspectors for Acme and the Government, handled various matters with reference to the records concerning Government-furnished machines and tools, and helped with preparation of requests for change orders. He did not make personal contacts with Government representatives in connection with Acme's Government contracts.

In the fall of 1953 he came across a number of vouchers and other cost records in Acme's files which related to repairs made by Acme to Government-owned machines supplied under the Facilities Contract 1214. On his own volition and in the interest of keeping adequate cost records should need arise for them, he undertook to segregate and allocate the cost records to individual machines, and thereafter as additional repairs were made to the machines he kept a running record of them as to each machine. There is no suggestion that this record in its inception was made for the purpose of a claim by Acme, since as of the fall of 1953 there was no prospect of the contract cancellation in July 1954. Under date of January 1954 he prepared a chart which depicted certain facts pertaining to Government-furnished machines, such as when they were ordered and received, the periods they were out of operation or not functioning properly and the reasons, and the nature and cost of repairs.

In September 1954 at the direction of his superiors, Hochstuhl prepared an up-to-date record of Acme's expenditures in repairing the various Government-owned machines. This record was based on the records he had compiled a year earlier and had kept current in the meantime. The cost record was attached to the letter from Acme (signed by Mr. Cohen, its secretary-treasurer) to POD on September 7, 1954, in which plaintiff refused to return the machines to the Government unless POD gave

assurance that Acme would be reimbursed for its cost of repairs. These facts are set forth in finding 53, *infra*. Other than as described there is no evidence from which it could possibly be inferred that Hochstuhl prosecuted a claim against the Government as Acme's agent.

[fol. 294] 33. *Lee.* Acme was experiencing difficulty in getting into production with the machines and tooling furnished by the Government. At Acme's request Watervliet Arsenal order Harold J. Lee, a machinist lead foreman at the Arsenal, to report to plaintiff's Lansdale plant for the purpose of assisting plaintiff in its technical problems. Under his official orders Lee worked at plaintiff's plant from his arrival on April 20 until April 24, 1953, at Government expense. Plaintiff requested the Arsenal to loan Lee's services for an additional week at Government expense, but this was refused. Instead, Lee was given official permission to remain at the plant, advising plaintiff in an absent-without-pay status from April 27 to May 1, 1953. During this latter period he worked 96 hours and was paid by the plaintiff $470 plus his hotel expenses, at the rate of $5 per hour compared to his Government salary rate of $2.60 per hour. The amount paid by Acme to Lee were charged against Contract 1213. Plaintiff was pleased with Lee's services and commended him to Watervliet Arsenal. Upon his return Lee filed with the Arsenal a trip report. There is no evidence of any improper conduct on the part of plaintiff with reference to Lee. Lee's observations of the plaintiff's operations and the nature of his services are described in finding 39(b)(1), *infra*.

CAUSES OF PLAINTIFF'S PRODUCTION DELAYS

34. *Prefatory statement.* The plaintiff contends that the defective condition of certain items of machinery furnished by the defendant under a so-called Facilities Contract, some of which machines were also used by its subcontractor, All Metals, was responsible for its inability to adhere to the original and subsequent delivery schedules under Contract 1213. Acme also asserts that the defective machinery caused not only the incurrence of unreim-

bursed costs of machinery repairs in excess of those anticipated, but also the delays which led to the assessment of liquidated damages for delinquency in deliveries. Plaintiff seeks to recover these costs and to have remitted the liquidated damages which have been withheld. The defendant contends that the machinery it furnished plaintiff was not defective but was usable, that plaintiff's difficulties in its use were attributable to improper installation and operat-
[fol. 295] ing incompetence, that plaintiff's actual cost of repairs and installation was well within its original estimate, that $44,358.58 of the amount spent by plaintiff for special tooling was included in its bid price (as amended by Supplemental Agreement No. 6) and the balance was plaintiff's responsibility under the terms of the Facilities Contract, and that the part of plaintiff's delays not attributable to its own deficiencies was attributable to the failure of All Metals to adhere to subcontract delivery schedules.

35. *Facilities Contract.* Clause 4 of Contract 1213 provided that plaintiff would have the right to use certain Government-owned machinery enumerated in the so-called Facilities Contract (No. DA-36-034-ORD-1214F) entered into between the parties simultaneously with Contract 1213, although not fully executed until February 27, 1953. The Facilities Contract contained the following selected provisions:

TITLE II

GOVERNMENT FURNISHED FACILITIES

ARTICLE II-A. DELIVERY.

1. The Government shall furnish to the Contractor the facilities described in Schedule "B", attached hereto and expressly made a part hereof, for use in the performance of certain supply contracts, identified in Article IV-A. The Government shall deliver, or has already delivered, such Schedule "B" facilities at the time or times stated in such Schedule or if not so stated in sufficient time to enable the Contractor to perform the affected supply contract(s). If any such

facilities are not delivered to the Contractor by such time or times, or are delivered in such condition as to require repair or rejection pursuant to the provisions of Paragraphs 2 and 3 of this Article, the appropriate Contracting Officer, upon written request of the Contractor, may equitably adjust the price, the time of performance, and other terms and conditions of the affected supply contract(s). In no event shall the Government be liable to the Contractor for damages or loss of profit by reason of any delay in delivery or failure to deliver any or all of the items set forth in Schedule "B", or for delivery of such items not in satisfactory operating condition or not of a suitable type. Any failure by the parties hereto to agree upon such equitable adjustment shall be determined in accordance with the article of the related supply contract(s) entitled "Disputes".

[fol. 296] 2. In the event Schedule "B" items are not in fit operating condition, the Contractor shall repair, restore, or rehabilitate such equipment so as to make it serviceable or fit for use (cost connected with such repairs, restoration, or rehabilitation shall not be reimbursed to the Contractor).

3. The Contractor reserves the right to reject any Schedule "B" facilities which are not of a suitable type or not in fit operating condition, or are not reasonably capable of being restored, repaired, or rehabilitated so as to make them serviceable.

ARTICLE II-B. INSTALLATION.

The facilities under this Title shall be installed by the Contractor in its plant or plants or, if approved in writing by the Contracting Officer, for temporary use in the plants of first tier subcontractors. All such facilities installed in plants of first tier subcontractors will be operated and maintained in the same manner as the facilities located in the Contractor's own plant or plants and the conditions of this contract shall apply to such facilities. It is the responsi-

bility of the Contractor to see that all provisions contained in the contract for the protection of the Government's interests in said facilities will be incorporated in the agreement under which such facilities are so placed.

ARTICLE II-C. TITLE.

Title to all property furnished by the Government shall remain in the Government. Title to the property furnished by the Government shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

TITLE III

COST OF THE WORK AND PAYMENT THEREFOR

ARTICLE III-A. REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

1. For the performance of this contract, the Government shall pay to the Contractor the costs and expenditures determined to be allowable in accordance with Section XV, Armed Services Procurement Regulation, as in effect on the date of this contract (such section being hereby incorporated and made a part of this contract by reference) for the following:

a. Cost of facilities procured from sources other than his own manufacture:

[fol. 297] (1) The net invoice price thereof.

(2) The cost of transportation to the Contractor's plant or other place of installation of said facilities, provided, however, that no reimbursement shall be owing to the Contractor hereunder when the invoice price described in subparagraph (1) has included the cost of transportation.

(3) Allocable overhead and general and administrative expenses.

(4) Any Federal, State or Local taxes arising from the acquisition for or delivery of such facilities to the Government.

b. Facilities manufactured by the Contractor: (other than those items included in subparagraph (c) below):

The costs incurred by the Contractor in manufacturing facilities hereunder as determined in accordance with Section XV of the Armed Services Procurement Regulation.

c. Standard or commercial items manufactured by the Contractor in accordance with provisions of Article I-A-5.

2. Costs and expenditures for the following will not be reimbursable hereunder:

a. Installation of facilities furnished by the Government (Schedule "B" facilities).

b. Installation of facilities acquired or manufactured hereunder (Schedule "A" facilities).

c. Plant rearrangement, rehabilitation and incidental construction necessary for the installation of facilities.

SCHEDULE "B"

2—#4 Rifling Machines
2—Boring Lathes
2—Honing Machines
2—Boring Bars 14′ 6″ each
1—Boring Bar 18′ 8″ to be modified for the rifling machine
1—Honing Bar & head complete
2—Rough Reamers complete
2—Finish Reamers complete
1—Set of Babbitts
1—Set Broach Rifle Cutters
1—Rifling Head
Plus Manufacturing Aids available from Watervliet Arsenal.

All items of Schedule "B" shall be furnished f.o.b. Watervliet Arsenal, and Contractor shall bear the cost of freight, installation and repairs without reimbursement by the Government.

[fol. 298] By letter dated January 27, 1953, Acme (per Norris and Chagnon) advised POD that the contractor would bear the expense of transporting, installing and repairing the two rifling machines, two boring lathes, and two honing machines listed in Schedule "B" of the Facilities Contract.

36. *Description of machines furnished.* The defendant furnished the plaintiff with a total of 19 machine tools, six of them under the basic Facilities Contract, and the balance under supplements 1, 2 and 3 thereto, issued in May 1953, and in January and April 1954. The following schedule describes each of the machines by name, gives its Government tag number for identification purposes, provides where known the date of manufacture of each machine and its cost when new, the date received by the plaintiff, and the condition of each machine.[2] [See schedule on page 93.]

Items numbered 1 through 11 in the foregoing schedule were authorized by Contract 1214 and Supplement 1 thereto, and as to them the plaintiff was continually obligated to bear the cost of freight, installation and repairs without reimbursement from defendant. The remaining items 12 through 16 in the schedule were authorized by Supplements 2 and 3 to Contract 1214, and as to them the plaintiff was contractually obligated to bear the cost of freight to its plant without reimbursement from defendant. As consideration for use of defendant's machines listed in the above schedule (except Items 1 through 6 for which there was no charge), the plaintiff agreed to a reduction of its Contract 1213 price by $18,602.55.

37. *How to make a gun barrel.* The plaintiff subcontracted the manufacture of the principal components of the rifle, except for the barrel which it manufactured in its plant at Lansdale. The plaintiff's manufacturing

[2] As will be shown later, the data relating to the reported condition of each machine is often unreliable.

Item No.	Type	Tag No.	Date of Mfr.	Original cost, new	Date ordered by plf.	Date supplied by def.	Condition [1]	Misc.
1	Hydraulic rifling machine	WV3038	1942	$17,852	1/20/53	3/5/53	R-3	
2	Mechanical rifling machine	C-1-5-A	1932	30,000	"	6/9/53	O-2	
3	Boring lathe, Le Blond	WV3990	1943	30,300	"	2/17/53	O-2	
4	Boring lathe, Le Blond	WV3992	1942	30,245	"	2/16/53	O-2	
5	Honing machine (Barnes)	WV3530	1942	15,137	"	2/17/53	O-2	
6	Honing machine (Barnes, Model 3)	ORD-11342-741	1952	30,415	"	10/5/53	O-2	
7	Lathe, Boye & Emmes, Model C	ORD-11342-713	1951	12,277		5/11/53	O-2	
8	Lathe, "	ORD-11342-714	1951	12,277		5/11/53	K-1-Base cracked at previous weld.	
9	Thread miller (Smalley)	WV3171	1942	8,500		2/13/53	O-2	
10	" "	WV2120	1939	7,651		2/13/53	R-2	
11	" (Lees-Bradner)	WV7020	1942	9,051		3/3/53	O-3	
12	Vertical milling machine (Cincinnati)	WV5081	?	7,582		?	?	
13	" "	WV2941	?	8,324		?	?	
14	3-Engine lathes (Reed Prentice)	ORD-759F 31, 33, 36.	?	22,041		?		
15	Milling machine (Lees-Bradner)	POD1092	?	8,995				
16	2 Lathes (Boye & Emmes)	ORD-11342 722 & 723.	?	24,554		?	?	

[1] The symbols used in this column to define condition of machinery are described in the official "Condition Code" as follows:

O-2—Used—Usable without repairs—good. Used property, more worn than O but still in good condition with considerable use left before any important repairs would be required.

O3—Used—usable without repairs—fair. Used property which is still in fair condition and usable without repairs; however, somewhat deteriorated with some parts (or portions) worn and should be replaced.

K-1—Used—reconditioned—excellent. Used property but repaired or renovated and in excellent condition.

R-2—Used—repairs required—good. Used property in good condition but considerable repairs required. Estimated cost of repairs would be from 11 to 25 percent of acquisition cost.

R-3—Used—repairs required—fair. Used property, in fair condition but extensive repairs required. Estimated repair costs would be from 26 to 40 percent of acquisition cost.

process for the production of rifle barrels consisted in general of the following sequence of operations:

(a) A seamless tube or forging furnished to plaintiff by the defendant was brought to a rough finish of the prescribed inside diameter of the barrel on a horizontal boring lathe, sometimes referred to as a reamer. The tube was placed on the lathe and secured firmly. A cut- [fol. 300] ting tool of appropriate size was placed tightly on the head of a boring bar. The machine then pushed the boring bar with the cutting tool at its head through the gun tube and as it rotated the cutting tool removed the metal evenly from the inside diameter of the tube until the desired dimensions were obtained.

(b) The tube would then be cut on a lathe to form the outside dimensions, including the taper of the barrel.

(c) The tube or barrel would then be placed on a honing machine for honing the interior of the barrel to the dimensions and smooth finish required, the honing being performed by a series of honing stones being passed through the tube on the end of a ram.

(d) Following this the rifling grooves were cut in the interior of the barrel by means of a rifling machine or broach. The barrel was placed on the machine and secured firmly. The appropriate size cutter blade was placed on the head of a rifling bar and fastened securely in place. To obtain the desired rifling the machine then pushed the rifling bar with the cutter at its head through the barrel in a spiral motion imparted by means of a key riding in a curved groove around the rifling bar. The machine then withdrew the bar from the barrel and the next larger size cutter was placed on the bar and the operation was repeated. The process continued with a larger size cutter blade being used on the head of the bar on each successive pass until the rifling or grooves inside the barrel were sufficiently deep and accurate to meet specifications.

(e) Finally, the breach end of the barrel was threaded on a thread miller and the barrel was paced off to the required length.

38. *Installation of machinery.*

(a) The schedule in finding 36, *supra*, shows that most of the machines furnished plaintiff by the defendant arrived at the Lansdale plant at various dates from February 13 to June 9, 1953. They were large and heavy, ranging in length up to 35 feet and in weight up to 40,000 pounds. For proper operation such machines must be absolutely level and be solidly fixed to foundations to prevent misalignment, vibration and movement. The building housing the Lansdale plant had formerly been a hos- [fol. 301] iery mill. It had a concrete floor, the thickness of which was disputed by the witnesses, whose estimates varied from three to five and one-half inches. An older section of the floor in the back of the plant where the large boring lathes were installed was repaired by plaintiff, but the remainder of the floor area was more recently constructed of reinforced concrete. The previous occupant had installed and operated knitting machines on the concrete floor. Knitting machines are not as heavy as the machines loaned by defendant to plaintiff to make gun barrels.

(b) There is a wide discrepancy in the testimony of the witnesses as to the adequacy of the plaintiff's installation of the machines in question, some of the testimony being diametrically contradictory. In general the plaintiff's witnesses testified that the legs of the two boring lathes were solidly based in specially excavated and poured concrete foundations four feet square and four feet deep, that the other machines were bolted to steel plates laid on top of the newer part of the concrete floor and were anchored to the floor by one inch round bars driven three feet deep into the floor and grouted in, and that, although one of the rifling machines vibrated at first, that was quickly corrected and thereafter none of the installed machines broke through the concrete or moved when in operation. On the other hand, several witnesses produced by defendant had been employed by plaintiff at the Lansdale plant for various periods in 1953 and 1954 and conveyed a radically different impression. They testified collectively that improper bedding of the machines caused them to vibrate in operation and to go out of alignment so that the high

tolerances required in the end product could not be consistently achieved; that the honing machine delivered in October 1953 was the only machine which was properly installed at the outset and none of the other machines delivered earlier was properly installed; that they caused the concrete to crack because of vibration; that Gromada (plaintiff's plant engineer, deceased at time of trial) refused to heed advice to reset the machines because of cost; and that one of the machines had to be shored up with wedges to make it level.

(c) In weighing conflicting evidence on this point due consideration must be given to the fact that none of the official reports of plant operations made by defendant's [fol. 302] personnel (so far as is contained in an otherwise voluminous record) make reference to inadequate installation as contributing to plaintiff's problems in operation of Government-furnished machines. Moreover, if it were to have been a serious factor at the time it is reasonable to believe that the plaintiff would naturally have taken immediate steps to correct the error early in the period of performance rather than permit it to go uncorrected and to plague all subsequent operations, for neither the cost nor the time in reinstallation would have been such as to warrant placing the entire contract in jeopardy by not correcting defects in installation. It is therefore concluded as a matter of fact that improper installation of machinery played a relatively unimportant role in plaintiff's production problems.

39. *Condition of government-furnished machines.*

(a) *Historical records.* Watervliet Arsenal, which supplied the machines to the defendant under the Facilities Contract, maintained a so-called "historical record" on each item of Government-owned machinery in its possession. The historical record described each particular machine in detail, listed its accessories, recited its successive uses, and reported its condition by means of a code as shown in the schedule included in finding 36. The historical record was not an entirely reliable reflection of the condition of the equipment, for not only did it have some gaps in the sequence of uses, but also the condition reported by code was based on visual inspection in most

cases instead of on operating experience, whereas certain types of defects would become apparent only in the course of operation. The historical record also did not relate the experience which previous users had with the machine. Watervliet Arsenal did not test the machines to determine their operability prior to delivering them to plaintiff. When the Government supplies a contractor with a Government-owned machine tool under a Facilities Contract, it certifies only that the machine is capable of performing a certain function as indicated in the historical record, and does not certify that the machine is equipped with all the special tooling and accessories needed to manufacture a variety of weapons. The terms "special tooling" and [fol. 303] "accessories" are different, but the difference is difficult to define and the terms are often used interchangeably with reference to particular devices used as adjuncts to the basic machine.

(b) *Contemporaneous writings relative to condition.* Throughout the period of contract performance the plaintiff frequently complained to the defendant that the Government-furnished machines were defective, and on numerous occasions the defendant sent inspectors and other technical personnel to investigate the complaints and to render assistance to plaintiff. Some of the complaints and reports of inspectors throw contemporaneous light on the condition of the machines and are quoted herein in pertinent part or are paraphrased.

(1) Under date of May 4, 1953, Harold J. Lee, machine shop foreman at Watervliet Arsenal, prepared the following report of his visit to the Lansdale plant from April 20 through May 1, 1953:

FACTS:

> On arrival I found that the contractor lacked a considerable amount of necessary small tooling. I pointed out what was lacking to the Shop Superintendent and they proceeded to either make or procure what was needed. For example, they had no keys with which to key their broach head to the bar or key the adapters. They had no bore sizer, and had no plugs for turning.

They were using a follow rest in lieu of a guide rest for starting reamers and it was proving unsatisfactory so I suggested this be changed. They replaced the follow rest with the proper bushing guide support and made new bushings. I also found a great deal of variation in the sizes their reamers were made to. This condition was corrected along with suggestions I made in regard to the method of holding the carbide tips. I found after all the conditions were corrected that the first reamer had insufficient stock removal so I suggested elimination of the first reamer. This proved quite satisfactory. The bores came straight and the reamers held size plus the fact that it cut the boring time in half, and eliminated the maintenance on one reamer. When I left they were boring at the rate of approximately nine tubes per nine hour shift; one shift per day.

On the hone they were having trouble with sufficient stock removal. This was corrected by reversing the stones every five passes. Ordnance inspection was not satisfied with the finish being produced, and I had [fol. 304] them change the coolant from Houghton honing oil to 60% Union base and 40% kerosene. I also recommended three hundred and twenty (320) grit stones manufactured by either Norton or Bay State. They also have difficulty inasmuch as the honing head is designed for hydraulic expansion and the machine did not have the hydraulic attachment. However, this equipment arrived at the plant the day I left. They also have no satisfactory method of measuring sizes in the machine. They have a short gauge that checks the bore size for about 12 inches on each end, but they need something faster and that will give a more complete check.

[NOTE: Mr. Lee testified that the lack of a hydraulic attachment did not affect the function of the machine but did lessen its efficiency.]

The second day after my arrival I suggested that they have their rifling bar checked for twist. Mr. Gromada assured me that it had been checked, however I questioned this, so they finally agreed to check

it again. I instructed them in the proper procedure and I found that the twist was one turn in 25 cal. instead of the prescribed one turn in 22. After considerable checking they found that the proper bar being cut at Firestone would not be ready until 10 May. Watervliet Arsenal was contacted and arrangements made to borrow a bar from Watervliet. This bar was shipped to Lansdale and the machine was set up. I recommended changes in their holding fixtures as I felt that the method they were using was insufficient. After a few minor corrections in the machine, and setting up a method of sharpening and stoning the cutters the machine operated satisfactorily. I had Mr. Snyder have a set of plugs made up to turn the tubes between centers, and instructed them in the operation of the Lees Bradner Thread Mill machining. However, the proper hob cutters are not yet available. They will be there around 10 May. They had some difficulty finish turning due to a lack of a steady rest. They overhauled the one they had and made a roller rest which worked quite well.

Mr. Gromada was quite concerned over the fact that he thought that when the lug was shrunk on the Chamber the threads would collapse and the components wouldn't go together. I recommended that they use at least half of their tolerance on their threads. They did this and the first two tubes assembled satisfactorily.

The one great deficiency in their set up was the lack of engine lathes, which I am informed is being taken care of. Two Boye and Emmes lathes are en route from Pontiac, Michigan, and should take care of this.

[fol. 305]

CONCLUSIONS AND RECOMMENDATIONS:

When I left they had about seventy tubes through the boring lathe and about half of these were through the honing operation. They have installed a method of checking runout with a center spot so should have no trouble there. Once they get the necessary engine

lathes they should have no trouble meeting their schedules.

Ordnance inspection seemed very inexperienced in regard to inspecting bores. They couldn't seem to make up their minds on finish, etc. Due to the indecision that was prevalent I would recommend that a visit by one of the inspectors from this installation would be a big help.

The manufacturer has adopted this Arsenal's method of manufacturing on the tube, and it would be a good idea, in my opinion, for the district to use our method of inspection.

(2) On June 8, 1953, plaintiff wrote the following letter to POD requesting an allowance for overtime expended as a result of trying to adhere to delivery schedules with defective Government-furnished equipment which delayed operations:

> Inasmuch as subject contract was bid in October 1952 and award was held up until the latter part of January 1953, due to conditions beyond our control, it was necessary for Acme to secure six (6) pieces of Government-owned equipment on a loan basis, along with five (5) pieces of leased equipment. All this equipment, with the exception of two lathes which were new, had been in storage over a long period, and the true condition of said equipment could not be determined prior to receiving same in our Lansdale plant, installing and actually operating the equipment.
>
> It was not until the middle of March that the true facts pertaining to the condition of the equipment became known. At this point many hours of straight time as well as overtime had to be worked in order to put this equipment in first class working condition.
>
> A great deal of time was lost in waiting for special parts. In fact we are still awaiting some parts . . . operating the machines at approximately 30% of their efficiency in the meantime. For instance the Lees Bradner thread miller is still out of operation due to the lead screw being worn beyond repair, and we are

presently chasing the threads on the rifle barrel on a lathe. The quality of the thread being done in this manner is very good; however, the time required is approximately five times longer than if the thread was hobbed with the Lees Bradner thread miller.

[fol. 306] Similar conditions existed on the two Smalley thread millers which we leased from the Government and in turn loaned to our vendor, All Metals Industries, who is manufacturing the Chamber and Vent assembly for us.

Once these particular machines were in working condition we had already spent many hours overtime, and it was necessary to continue this overtime work in order to comply with the specified delivery schedule. It is a fact that we have been unable to adhere exactly to said delivery schedule, but we feel certain that by working this overtime all deliveries will be up to date within thirty (30) days from date.

Therefore, we feel justified in requesting payment or allowances in our renegotiation of costs for 4,826¾ hours of overtime at a total cost of $11,-601.40, which was incurred between February 1, 1953 and May 17, 1953. We further feel that we will use approximately 50% of the above hours and monies in order to meet June and July deliveries, and hereby request an allowance for same.

(3) On June 18, 1953, plaintiff wrote the following letter to POD requesting an extension of delivery schedules due to defects in Government-furnished machines enumerated in some detail:

Pursuant to Article II-A, page 6 of facilities contract 1214F, and in accordance therewith, we are requesting the release accorded us under said provisions. Various machines supplied to us on the original award and later machines which we have procured on a rental basis were not in fit operating condition, or were delayed at point of origin for a long period of time due to clearance papers and packaging procedures controlled by Government agencies.

The following is a list of machines that required a large amount of repair, or were delayed beyond the

delivery time stated by us when our present delivery schedule was agreed upon in the office of Philadelphia Ordnance District during the week of 19 January 1953. These machines are directly responsible for our inability to deliver seventy-four (74) guns in May, and a setback on our June schedule of 233 guns.

Rifling Machine—12G American—Govt. Tag WV-3938.

Requisitioned February 2 and received March 10. Has not been used to date as we are still waiting for parts that have been on order since receiving machine. [fol. 307] We expect this machine will be ready to operate within two weeks. The rifling bar that came with this machine had to be sent to Firestone for cutting proper groove from 25 cal. to 22 cal., and to date has not been received from them.

Honing Machine—Barnes Model 6C—Govt. Tag WV-8530

Requisitioned February 3 and received February 18. Certain parts on the supporting table were missing and due to a long delivery given by the manufacturer for these parts, said parts were made in our shop. The machine was finally put in operation about the middle of April. The motor that came with this machine apparently had come from another machine and would not fit in its proper place. Several days were lost in making a table attachment to the machine for this motor.

Boring Lathe—No. 4 LeBlond—Govt. Tag WV-3990

Requisitioned February 2 and received February 18. The steady rests and chucks of this machine were made for a 12″ barrel. Therefore, we had to bush them down to fit the 75/MM barrel which involved over thirty days of machining and fitting as well as grinding. This machine had only one steady rest with it, and in order properly to bore the barrels, two steady rests are necessary. Inasmuch as we could not locate another steady rest, we proceeded to

build our own steady rest, which involved considerable time. This boring lathe was put in operation about the middle of April.

Boring Lathe—No. 4 LeBlond—Govt. Tag WV-3992

Requisitioned February 2 and received February 18. This was in same condition as above boring lathe (WV-3990) and still is not in operation due to our having to make two steady rests for this machine. We expect to have it operating within the next two weeks.

Thread Millers—Smalley General—Govt. Tags WV-3171 and WV-2120

Requisitioned February 6 and received March 3 by our subcontractor All Metals Industries Inc., who are machining and threading the chamber and vent assembly for us. These machines had to be completely overhauled, and only recently were put in operation. Here again the lead screw had to be completely rebushed which involved the making of several parts due to the long delivery quoted by the manufacturer of said parts.

[fol. 308] *Boye & Emmes Lathes—Govt. Tags WY-2258894 and WY-2258895*

Requisitioned March 31 and received May 18. These lathes were new and in good condition, and have been operating in our plant since May 20. These two lathes are helping us to pick up a back log on the O.D. turning of the barrel and the final machining of the O.D. on the barrel. Not having these machines sooner has hurt our delivery considerably at the present time, but within the next two weeks they will help to remove any bottlenecks on this operation.

Thread Miller—Lees Bradner—Govt. Tag WY-941347

Requisitioned February 10 and received February 18. We have had considerable trouble with the lead screw and hob on this machine, and through extensive repairs and completely overhauling the lead

screw bushing and mounts, plus replacing the hob, we were just able to put this machine in operation on June 11. A replacement lead screw from the manufacturer was subject to six months delivery.

Rifling Machine—No. 4 Leblond—Govt. Tag C1-5A-2

Requisitioned February 2 and received March 3. Steady rests had to be rebushed from 8" down to 4½". Boring bar was sent to Firestone for changing the groove from 25 cal. to 22 cal. A bar was loaned from Watervliet Arsenal to put this machine in operation, and the original bar received on machine was returned to us from Firestone on June 5. We are now ready to apply this bar which involves a major change.

Other tooling such as jigs, fixtures and manufacturing gages requisitioned on February 11 and received from Watervliet Arsenal on March 4 could not be used. Inasmuch as we had anticipated using some of this tooling after it finally arrived, we then had to replace same which took considerable time. This is one of the reasons why we were unable to make our proper delivery. This is true especially on the two parts i.e. chamber and vent assembly, which All Metals Industries is machining for us, since not one piece of the Watervliet tooling could be used on their machines. These two particular parts are the ones that have held up our delivery.

Request was made on February 2 to Philadelphia Ordnance District for approval to use molds located at various subcontractors' plants to produce component parts. These subcontractors were currently producing these items for Firestone. Cleveland Ordnance District and Pittsburgh Ordnance District had [fol. 309] to give approval since these involved their prime contracts, and final clearance was arranged on March 17.

Therefore, because of the conditions above and beyond the control of Acme Coppersmithing and Machine Company, we are respectfully submitting our revised forecast delivery schedule as follows:

June '53	30	January '54	233
July	125	February	233
August	233	March	233
September	233	April	233
October	233	May	70
November	233		
December	233	Total	2,322

This will enable us to complete our contract within the original completion period. If monthly forecasts can be exceeded, we request the authority to do so.

We would appreciate any consideration to the above request, and thank your offices for all past cooperation.

(4) On October 21, 1953, plaintiff wrote to POD requesting further extension of the delivery schedules, assigning the following reasons for delay:

The following production machinery is furnished by the Government:

MACHINE DESCRIPTION	DOLLARS EXPENDED	NET RESULTS
LeBlond Broaching Machine Govt. Tag G15A-2 Ser. 4BM8.	3,049.12	Unserviceable.
#120 American Broaching Machine Govt. Tag WV3033 Ser. 3628.	4,597.36	Unserviceable.
Barnes #10 Horisontal Honing Machine Govt. Tag WV8530 Ser. 2805.	2,973.72	Unserviceable.
Lees Bradner Thread Miller-Model HT Govt. Tag WV7020 Ser. 966.	877.75	Unserviceable.

This equipment was carefully examined before it was placed in the line, and it was only during production that these hidden faults became apparent. After a total expenditure of $11,497.95 these machines are still unserviceable.

Mr. Roy Hepburn, after a detailed investigation of the above equipment, has certified that the machines are unserviceable, and are responsible in large part for Acme's inability to meet the contract delivery schedule, and has recommended replacement.

Acme Coppersmithing and Machine Company, if the above machines were serviceable, is ready to meet the contract delivery schedule, but owing to the fact

that Mr. Hepburn is replacing the unserviceable machines, the month of December will have to be zero
[fol. 310] (0) in order to allow sufficient time to remove the unserviceable equipment and install replacement machines; also, there is a strong possibility that the tooling on the present machines may have to be altered to make them applicable to the new machines. In order to meet the requested delivery schedule, it will be necessary to have the replacement machines in the line by December 1, 1953.

(5) In a letter dated November 9, 1953 to POD the plaintiff stated in part as follows:

> As a result of a survey made by Machine Tool Section your District, two (2) machines supplied to us under Schedule "B" of above contract were found unserviceable, and we were advised that replacements of these machines would be made as soon as possible. Machines in question are:
>
> LeBlond Boring Lathe—Ser. 4GSR-151—Govt. Tag WV3990—Value $30,300.80.
> Lees Bradner Thread Miller—Ser. HT-966—Govt. Tag WV7020—Value $9,051.44.
>
> We request immediate arrangements be made for replacement of above machines as soon as possible.

(6) On November 9, 1953, the plaintiff wrote again to POD describing the condition of a honing machine recently received and requesting the defendant to supply certain items required for effective use of the machine, as follows:

> Your attention is invited to the Barnes #3 Horizontal Honing Machine, Govt. Tag 11342-741, Ser. No. 8869, which we received from Pontiac Motors, Pontiac, Michigan on September 21, 1953 through Schedule "B" Facilities.
>
> As you well know, this machine was procured by the Government for a 57/MM operation and was short a honing bar and head attachment for this type operation. Since it has been supplied to us for our 75/MM Recoilless Rifles, the guide trough bushing

and oil trough are adapted for a 1¼" bar; our operation calls for a 2½" bar.

Through investigating the possibility of getting this machine complete with its required components to effectively use this in our present production, we were verbally advised by Mr. R. Hepburn, Machine Tool Section, Philadelphia Ordnance District, that the items required to effectively use this machine in our production line would be supplied and paid for by the Government upon our submitting a quotation as to their cost. The following are parts we require:

[fol. 311] 1 10' Honing Bar with 3" diam. Honing Head to hone 60" Tube.
8 Sets Stone Holders for above head.
1 Head Coupling
Guide Trough Bushing
Oil Trough

We were advised by the Micromatic people that the delivery on above items would take approximately twelve (12) weeks to complete at a cost of approximately $2,200. They will officially confirm this by formal quotation which should be received by us the latter part of this week. Copy of same will be forwarded to your office promptly.

(7) On February 23, 1954, plaintiff wrote the following letter to POD:

This will confirm several conversations we have had with you relative to the trouble we are having on the two broaching machines. As you realize, the broaching machines in our production set-up control the quantity of guns that can be shipped in any given month.

We have had very high rejections on gun tubes not holding their concentricity requirements, and we have found this fault lies within the mechanisms of these machines. We are extremely worried as to whether or not we will be able to meet our delivery schedule for March, and are wasting no time in thoroughly inspecting and adjusting the above machines. As soon

as the fault is known, and if corrective steps can be taken, we shall notify your office.

These machines practically have been shut down for the entire month of February, and we can assure you that no time has been lost in trying to get these machines in operation. We have requested Ordnance Inspection to aid us in taking corrective steps.

(8) On March 1, 1954, plaintiff wrote the following letter to POD:

> On the following dates our company requested either Messrs. Hepburn or McMenamin of Machine Tool Section P.O.D., to visit our plant and advise us the proper setting up of the two rifling machines, namely, LeBlond, Ser. No. 4RM8, Govt. Tag G15A-2 and American 12G, Ser. No. 3628, Govt. Tag WV3938 since we are having extreme difficulty in holding our rifling of tubes to the tolerance required by the print and Ordnance gages. The dates are: October 21, November 23, November 24, November 25, December 4, December 24 and February 10, 1954.
>
> [fol. 312] During each visit your Machine Tool Section has made certain recommendations on the adjustment, repair or replacement of parts on these machines, and in every case we have followed their instructions to the letter.
>
> In addition to the above we requested the American Broach & Mach. Co. of Ann Arbor, Michigan, to send Mr. G. A. Deming to assist us in the setting up of the hydraulic system on the American broaching machine. Mr. Deming corrected the functioning of the hydraulic system enough to put us in operation. But, it was impossible to eliminate the erratic forward motion of the rifling bar due to leaks in the main cylinder and pressure control valves. To rectify this would require factory repairs.
>
> During the latter part of January '54 your Inspection Branch was supplied a new concentricity gage to check rifling and the i.d. of the gun tubes. It was at this time that we realized we were faced with the rejection of a large quantity of tubes due to the use of this gage.

Please note that up to this time the gage originally put into service by Ordnance was functioning satisfactorily, meaning that our rifling machines were producing acceptable tubes on the original gage being used by Ordnance Inspection.

We have now reached a point where we feel we have exhausted all sources of know-how in rectifying the faults in these machines furnished by the Government. These machines are in proper alignment and level, but still there is some fault causing rejected tubes. We would greatly appreciate your office sending a man from Watervliet Arsenal to our plant who will be able to service these machines put them in efficient running condition or take the necessary action to eliminate our present difficulties.

Please note that we have lost complete production for the entire month of February, and if this condition exists any longer, our shipments for the next two months will be greatly endangered.

We feel that our procedure in manufacturing the 75 m/m Recoilless Rifle is accurate, and sound shop practice is now in full force and effect. In the interest of meeting our delivery schedules which we have firmly established over the last two months, we are asking for your immediate cooperation.

(9) On March 29, 1954, plaintiff wrote the following letter to POD:

[fol. 313] We wish to offer our sincerest thanks and appreciation for the splendid cooperation and assistance rendered by the Philadelphia Regional Office, through Mr. Edward Dougherty, P.O.D. and Mr. Roy Hepburn and Watervliet Arsenal personnel in having a Mr. Earl G. Heiner of said Arsenal visit our plant on the 12th and 13th of March 1954.

As a result of these visits, recommendations were made to replace the one Mechanical Broaching Machine with a more serviceable one, and also the use of cutter heads presently being used by Watervliet Arsenal in the rifling of seamless tubing. It was also pointed out by Mr. Heiner, that the rifling bar on

the Hydraulic Broaching machine will have to be repaired by regrooving the slot in the rifling bar. Arrangements are being made to ship this bar to Watervliet Arsenal for machining, after the unserviceable rifling machine is replaced, so that our production on rifling gun tubes is not endangered.

(10) On April 16, 1954, James F. McMenamin (presumably an expert sent by POD to plaintiff's plant) wrote to plaintiff as follows:

> Your letter of April 8, 1954 received requesting a written report of my findings on your rifling machine in your plant on February 10, 1954.
>
> Your Mr. C. Hochstuhl requested Mr. R. L. Hepburn in P.O.D. office to have me go to your plant on the above date and on my arrival in your plant I found the rifling gauge had been replaced by a new gauge with .002″ tolerance—the old gauge had .004″ tolerance.
>
> In order to use the new rifling gauge, the tube when set-up in the rifling machine had to be in line within a .003″ of a thousand in order for the new gauge to pass through the bore of the tube after rifling.
>
> The following suggestions were made:
>
> Make two (2) tube support brackets lining the brackets on the machine with the cutter bar support bracket. Spot turn the tube diameter on the engine lathe to suit the bore in the tube support brackets.
>
> I requested the P.O.D. to give .003″ tolerance on the rifling gauge, or increase the bore diameter in the tube .001″ thousand. It was requested that the P.O.D. have the tubes stress relieved after the rough turn and rough bore operations.
>
> I also noted that after parkerizing three or four tubes out of 12 at 180 degrees the gauge would not [fol. 314] pass through the bore. These tubes were returned to the Honeing Machine to be rehoned.
>
> Mr. Haplan, P.O.D. Head Inspector at your plant was of the opinion your shop could produce these tubes with the present equipment by relining the ma-

chine. He asked for a week or two in order to line up the adjustable steady rest with the rifling bar and tool guide support bracket.

(11) On May 23, 1954, All Metals wrote the following letter to plaintiff:

> We refer to your phone request of April 27 pertaining to our furnishing information as to the operating condition of the Smalley-General thread millers which we received under lease arrangement from Watervliet Arsenal.
>
> In view of the fact that these machines were equipped with 440 volt motors which could not be reconnected for 220 volt service, it was necessary for us to delay installation until we could have 440 volt service installation made. This new service installation has just been completed within the last few days and we have the machines wired and ready for operation.
>
> One of the machines, Arsenal number 3171, serial number 455, has been tried in operation and has proved to be satisfactory. The second machine, Arsenal number 2120, serial number 384, is completely wired and is in process of being set up for trial. As soon as trial runs have been made, we will report to you the operating condition of this machine.
>
> With reference to both of the above machines, a considerable amount of work was necessary, both electrical and mechanical, to put them into operating condition. Apparently when these two machines were removed from operation and prepared for government storage, the person or persons doing the preparation were somewhat overzealous in application of the preservative material. For example, a good portion of the electric switch gears on both of the items had to be removed and replaced due to the fact that covers had been removed from switch gear boxes and preservatives sprayed on all electrical contactors and equipment. Most of the electric wiring connections had been removed by the expedient method of

jerking them completely loose from their moorings. Much of the inter-connecting wiring was either so impregnated with preservative material, or damaged to the extent that it had to be replaced.

As you can see from the foregoing, we have spent considerable time and expense in preparing these ma-
[fol. 315] chines for operation in our plant, but we feel that the major portion of this work has now been completed and the machines will satisfactorily serve the purpose for which they are intended.

There are certain parts missing from the machines, such as hand wheels and handles, for which we will improvise replacements so that we may get the machines in operation at the earliest possible date. A complete inventory of electrical and mechanical parts, necessary for the operation of these machines which were not shipped to us, will be forwarded to you at a later date. We will also advise what electrical equipment it was found necessary to replace. Apparently all of the necessary change gears have been provided with the machines to permit them to produce the chamber and vent assembly parts.

40. *Other indicia of condition of machines.*

(a) *Boring Lathe No. 3990.* Under the Facilities Contract the Government was obligated to furnish plaintiff the subject machine, together with a rough reamer and a boring bar 14′ 6″ long. On or about February 17, 1953, the machine was delivered to plaintiff. The last use of the machine preceding its use by plaintiff, so far as disclosed by the historical record accompanying the machine, was in 1943, and at that time it was inventoried with certain related equipment and controls, including a boring bar 4′ long. At some subsequent undisclosed time, but prior to June 30, 1955, the Government furnished plaintiff with a 17′ 7″ boring bar. As of April 7, 1954, the machine was in plaintiff's possession in 0-2 condition, together with enumerated controls and accessories. There is no way of ascertaining the condition of the machine as of February 17, 1953. From February 17, 1953, through November 1953 plaintiff expended $1,902.02 on the ma-

chine, including $430.67 for repairs, $323.60 for installation expenses, and $1,147.75 for special tooling, the last item being so listed in the special tooling inventory dated July 15, 1958, attached to plaintiff's termination type claim. Included in the special tooling category of plaintiff's expenditures is $377.85 for a chuck, since the one furnished by the Government with the machine was not of the correct size. There is no record of an expenditure for fabrication or modification of steady rests for the machine, as plaintiff reported to defendant by letter dated June 18, 1953, but the historical record indicates that only [fol. 316] one steady rest was provided with the machine instead of two as required, so it is concluded that plaintiff had to fabricate at least one steady rest at an undisclosed cost, and the other steady rest required modification.

By letter of November 9, 1953, plaintiff reported that the Government had found this machine to be unserviceable, but there is no other record of such determination. It is considered unlikely, however, since between that date and the inspection finding of April 7, 1954, that the machine was then in 0-2 condition, plaintiff spent only $52.88 in repairs on it.

The installation expense of $323.60 includes $237.60 for the services of four men for three days to correct the bed of the machine at some undisclosed later date. This corroborates defendant's contention that the machine was defectively installed in the first instance.

Other references to the condition of the machine are to be found in the written communications reprinted in paragraphs (1), (3) and (6) of finding 39(b), *supra*.

Several conclusions are reached from the foregoing facts, viz: the defendant's failure to supply with the machine a boring bar of the size required by the Facilities Contract, an omission later rectified, is not claimed by plaintiff as a cause of delay. In the absence of definition in the Facilities Contract as to what is comprehended in the term "manufacturing aids available from Watervliet Arsenal", which the defendant was to furnish, it is assumed for want of any better interpretation that the aids in the form of accessories and special tooling which were actually supplied with the machine by necessary implica-

tion should have been usable for the purpose of manufacturing 75 mm. guns. Otherwise, the quoted phrase would be meaningless. In this case the defendant supplied a chuck and steady rests of the wrong size which occasioned the plaintiff some expense and delay to correct. In contracting to pay for repairs to the machine the plaintiff must have contemplated a reasonable amount of repairs, and the repairs itemized in record do not seem unreasonable or excessive. On the other hand, the plaintiff installed the machine improperly in the first instance and considerably later had to reinstall it, thus causing problems involving delays. Moreover, much of the plaintiff's [fol. 317] problems with the machine arose from inefficient operation attributable to inexperienced employees, as reflected in the Lee report (finding 39(b)(1), *supra*). In summary, the defective nature of the machine, as a factor in plaintiff's costs and delays, was substantially outweighed by the factors of improper installation and incompetent operation, both of the latter being attributable to the plaintiff.

b) *Boring Lathe No. 3992.* Under the Facilities Contract the Government was obligated to furnish plaintiff the subject machine, together with a rough reamer and a boring bar 14′ 6″ long. On or about February 16, 1953, such a machine was delivered to plaintiff. The last prior use of the machine disclosed by the historical record was in 1943, at which time it was inventoried with certain related equipment and controls which did not include a boring bar. At some subsequent undisclosed time prior to June 30, 1953, the Government furnished plaintiff with a boring bar 18′ 8½″ in length. As of April 7, 1954, the machine was in plaintiff's possession in 0-2 condition, together with enumerated controls and accessories. There is no way of ascertaining the condition of the machine as of February 16, 1953.

From February 16, 1953, to April 21, 1954, plaintiff expended $2,457.86 on the machine, including $1,031.61 for repairs, $232.75 for installation, and $1,193.50 for special tooling ($720 of which was listed as such in a special tooling inventory dated July 15, 1958, attached to plaintiff's termination type claim). Of the expenses in

the special tooling category, $423.60 is represented by the fabrication and rebuilding of two steady rests for the machine, to replace the steady rests supplied with the machine which apparently were designed to accommodate a different size gun barrel than the 75 mm.[3] Other references to the condition of the machine are found in the letter quoted in finding 39(b)(8), *supra*.

Study of the expenses to repair this record boring lathe lead to the conclusion that it was in somewhat worse condition than the first one and caused the plaintiff some delays. For example, the plaintiff's expenditures for fabri- [fol. 318] cating two steady rests to replace the steady rests supplied with the machine occurred in August 1953, approximately six months after the machine was delivered. Whether or not the repairs to the machine exceeded reasonable expectations is conjectural. The evidence does not satisfactorily establish that the second boring lathe was improperly installed. It is probable that the plaintiff's lack of operating experience was fully as responsible as the condition of the machine for the difficulties and delays plaintiff had in its use.

(c) *Honing Machine No. 8530.* Under the Facilities Contract the Government was obligated to furnish plaintiff the subject machine, together with a complete honing bar and head. On or about February 17, 1953, the machine was delivered to plaintiff. The last use of the machine preceding its use by plaintiff was in 1951, and at that time it was inventoried with related equipment and controls. Its condition was not reported as of 1951, but as of September 15, 1954, was reported as 0-2. Upon delivery the machine lacked an hydraulic head attachment designed to expand the honing stones, but this arrived about May 1, 1953. The machine could be used without the attachment, but operated less efficiently without it and tended to hone the inside of the gun barrels unevenly. On June 18, 1953, the plaintiff complained of certain parts which were missing from the machine on delivery and which plaintiff had to fabricate, thus causing an

[3] Comparative analysis of the plaintiff's vouchers and its complaint to defendant of June 18, 1953, indicates some confusion between boring lathes 3990 and 3992.

alleged delay to mid-April before the machine could be operated, but the only parts which the defendant should have supplied, but did not so far as the record corroborates, are an electric motor purchased in May 1953 and the hydraulic head mentioned above, and two steady rests which the plaintiff fabricated.

From February 17, 1953, to May 22, 1953, plaintiff expended $2,067.42 in repairs and $1,238.40 in special tooling on this machine. The special tooling expense consisted of a filter, a pump and a set of stone holders, all of which appeared in a special tooling inventory attached to plaintiff's termination type claim dated July 15, 1958. The repair expense included $1,260 for the steady rests mentioned above, which are also classifiable as special tooling. By letter of October 21, 1953, to the defendant (finding 39(b)(4), *supra*), the plaintiff referred to the fact that a [fol. 319] Government representative had declared the machine to be unserviceable and recommended replacement. This contention is not refuted in the record. Other references to the condition of this machine are found in the letters quoted in paragraphs (1), (3) and (4) of finding 39(b), *supra*.

Determination as to whether the machine supplied by the Government met with the requirements of the Facilities Contract involves an interpretation of what the latterd required, an intimate understanding of the various parts to the machine so that the record of expenditures can be interpreted, and the customary resolution of conflicting testimony, none of which lend themselves to easy solution. The defendant was clearly at fault in not supplying an hydraulic head with the machine, and less clearly at fault in not supplying usable steady rests and in supplying a machine requiring excessive repairs. On the other hand, there is evidence that the plaintiff's lack of operating experience contributed to its difficulties. It is not established that the plaintiff's troubles were attributable to improper installation of the machine. By attaching significance to the fact that the machine was replaced after the plaintiff's complaint in October 1953 that it was unserviceable, it is concluded on balance that the machine was defective upon delivery, that its condition was worse than plaintiff could have reasonably antici-

pated and occasioned it excessive expense and delay, and that plaintiff's unfamiliarity and inexperience with the operating characteristics of the machine was also an important factor in the plaintiff's difficulties.

(d) *Honing Machine No. 741.* This was the second of the two honing machines which the defendant was obligated to supply plaintiff under the Facilities Contract. It was manufactured in 1952, used by another Government contractor, and was received by plaintiff on October 5, 1953 (over seven months late for some unexplained reason), at which time it was reported conflictingly to be in N-1 and O-2 condition, a contradiction which the record does not explain. In the three months following delivery of the machine the plaintiff expended $1,479.62 on it, including $229.80 for repairs and $1,249.82 for tooling and/or accessories. $1,132.79 of the latter item was denominated as tooling in the special tooling inventory which plaintiff attached to its termination type claim [fol. 320] dated July 15, 1958. By letters of November 9 and 17, 1953, to defendant, the plaintiff confirmed its understanding that the machine was designed for use in the manufacture of a different size gun and would require certain adaptations to use for making 75 mm. guns, which adaptations would cost the plaintiff $937.20 and would take eight weeks from the latter date to accomplish. Plaintiff requested authorization and reimbursement for the expenditure, and stated that the need for major repairs to the other honing machine was handicapping operations. There is no response in the record to these representations and they appear to be roughly consistent with the record of expenditures made to the second honing machine as that record is reduced by elimination of items either ordered long prior to the arrival of the machine or not clearly identifiable as a repair, an accessory, or as special tooling. Other references to the condition of this machine are found in paragraphs (1) and (5) of finding 39(b), *supra.*

(e) *Rifling (i.e., broaching) Machine No. 3938.* The defendant was obligated under the Facilities Contract to furnish the plaintiff two rifling machines, a rifling head, and one set of cutters. One of the rifling machines was

received by plaintiff on March 5, 1953. The records accompanying the machine indicate that it was in R-3 condition as of August 1951 (per visual inspection) and was certified to be in 0-2 condition apparently as of September 1954, although the precise dates of these condition ratings are subject to some doubt. The top bar bracket was listed as broken, apparently as of August 1951. It was delivered to plaintiff with certain listed controls and attachments and/or accessories, none of which seem to include a rifling head or a set of cutters of the proper size. Subsequently the defendant supplied plaintiff with a steady rest fixture and a rifling bar for the machine. The tooling furnished to plaintiff was not adequate to hold the gun tube in place in the machine and had to be reworked to adapt it to the rifling of a 75 mm. gun barrel. The rifling bar furnished plaintiff by defendant had the wrong twist and plaintiff was delayed several weeks waiting for this to be corrected at a cost of $726.34.

Plaintiff expended a total of $2,708.92 on this machine, all but $754 of which was spent during the six months [fol. 321] following its receipt. Of the plaintiff's total expenses, $2,478.92 was for repairs, $35 for installation, $70 for maintenance, and $125 for tooling. In addition to the above expenses, defendant paid $1,280 (reimbursed by defendant) for a centering fixture for the machine as an item of tooling, and plaintiff bought $5,263.09 worth of expendable cutters. The testimony of defendant's witness that the machine was in good working condition as of May 1, 1953 is not consistent with the fact that all but $825 of plaintiff's expenses for the machine occurred after May 1, 1953.

In summary, it would appear as to this machine that the defendant delivered it in defective condition and without the equipment required by the Facilities Contract, and that it required frequent repairs which were both costly and time-consuming. Other references to the condition of this machine are found in the letters quoted in paragraphs (1), (3), (4), (7), (8), (9) and (10) of finding 39 (b), *supra.*

(f) *Rifling (i.e., broaching) Machine No. C-1-5-A-2.* The second of the two rifling machines required by the

Facilities Contract was received by plaintiff on February 20, 1953. Its condition was listed conflictingly in the historical record and other documents relating to the machine as 0, 0-2, and "fair", but it is not clear whether these condition ratings apply to the time of its receipt by plaintiff, or to September 1954 when it was certified for inventory purposes, or to some other time. As guides to determine the condition of the machine at the time it was delivered to plaintiff the entries on the historical record are useless. Another hand-written entry on the historical record refers to "Scrap", but this is equally inconclusive.

Plaintiff spent $8,034.73 on this machine, including $1,266.40 for repairs, $35 for installation, and $6,733.33 for special tooling (including $5,188.28 for expendable cutter blades, $702.05 for modification of a rifling bar supplied by defendant, and $825 for replacement of a cutter head supplied by defendant).

The plaintiff experienced trouble with both of the rifling machines furnished under the Facilities Contract. Because of the erratic thrust of the rams carrying the cutter blades and shifting of the cutter blades inside the [fol. 322] tube the lands of the rifling would be scratched, the grooves would have tears, and there would be steps in the edges of the lands. The plaintiff made frequent complaints about the rifling machines and the defendant sent representatives on many occasions to advise and assist plaintiff in overcoming its difficulties. In March 1954 POD representatives recommended the replacement of rifling machine No. C-1-5-A-2, and repairs to the rifling bar on the other rifling machine. Other references to the condition of this machine are contained in the letters quoted in paragraphs (1), (3), (4), (7), (8), (9) and (10) of finding 39(b), *supra*.

(g) *Lees-Bradner Thread Miller*. Supplemental Agreement No. 1 of May 26, 1953 provided for the furnishing to plaintiff of the subject machine, which was received by plaintiff on February 18, 1953. It was delivered to the plaintiff without a steady rest, which was not listed among the accessories on the historical record. It is not clear from the record whether a steady rest is part of a

general purpose machine such as this or is an item of special tooling, in which case it would have been the plaintiff's duty to provide. The historical record reports the condition of the machine conflictingly as being rated both 0-3 and "fair" as of April 7, 1954, and 0-2 apparently as of September 8, 1954. The Condition Code defines 0-3 condition to be "Used-Usable Without Repairs-Fair. Used property which is still in fair condition and usable without repairs; however, somewhat deteriorated with some parts (or portions) worn and should be replaced." Plaintiff overhauled a steady rest to use with the machine and fabricated a roller rest for it. It found the lead screw to be worn beyond repair and, instead of taking several weeks to order a replacement, dismantled and repaired the worn lead screw from end to end over a three-week period. The machine was repaired and in operation by June 11, 1953. On October 21, 1953, the plaintiff complained to defendant that the machine had been declared unserviceable by a Government representative, who had recommended that it be replaced. There is no record of a response to this complaint, but apparently the machine was not replaced since the historical record indicates that it was inspected and found to be in 0-3 condition as of April 7, 1954. At some time plaintiff [fol. 323] sent this machine to All Metals for use in performing the latter's subcontract, but it did not prove satisfactory in All Metals' operation and was returned to plaintiff. Plaintiff testified that it spent $375.10 to repair the machine, but offered no vouchers to support these charges.

(h) *Boye & Emmes Lathes Nos. 713 and 714.* These machines were received by plaintiff on May 11, 1953, at which time they were new and in good condition. Plaintiff spent $2,477.84 on the two machines, including $73.60 for repairs and the balance for six special roll lock centering plugs which were special tooling not included in the list of attachments and/or accessories contained in the historical record. The plugs were plaintiff's responsibility.

(i) *Two Smalley General Thread Millers Nos. WV 2120 and 3171.* These machines were received by plaintiff on February 13, 1953, and transferred to All Metals

on March 3, 1953, for use in machining and threading the chamber and vent assemblies which All Metals was to manufacture for plaintiff under the subcontract. One of the machines was in 0-2 condition, apparently as of October 23, 1953, and the other was rated to be in R-2 condition at some undisclosed date. The Condition Code defines R-2 condition to be "Used-Repairs Required-Good. Used property in good condition but considerable repairs required. Estimated cost of repairs would be from 11 to 25 percent of acquisition cost." The defendant's acquisition cost of the machine was $7,651.32. On May 23, 1953, All Metals advised plaintiff that they had performed considerable electrical and mechanical work on the machines to put them in operating condition, that certain minor parts of the machines were missing, that the principal reason for delay in placing the machines in operation was that the All Metals plant had to be rewired to accommodate the 440 volt motors of the machines, and that both machines were by May 23 ready for operation and one of them had proved to be satisfactory. There is no record of All Metals' expenses in repairing and installing the machines, except a report in July 1954 by All Metals to POD that it had spent about $8,000 in repairing the two machines in question as well as two lathes and a milling machine which plaintiff had procured for [fol. 324] All Metals from the defendant. But there is no other proof of these expenditures in the form of vouchers, etc.

41. *Plaintiff's Inexperience.* In undertaking to manufacture 75 mm. rifles the plaintiff embarked on an undertaking completely foreign to its previous production experience. Both the personnel hired for the Lansdale plant and the machinery with which to perform the contract were new and untried to the plaintiff. It is quite natural that many production errors and inefficiencies resulted, such as improper installation and poor alignment of certain of the machines, unsuccessful experimentation with untried methods of fastening cutters to reamers on the boring lathes causing oversize cutting, inaccurate centering of the bushing which guided the reamer on the boring lathe through the gun tube, unfamiliarity with the technique of reversing the honing stones on the honing ma-

chine so as to improve their cutting efficiency, and unwise investment in certain expensive accessories to machines which proved not only to be useless but harmful as well to the machines and work product. Naturally most of these problems arose in the earlier chapters of performance and were solved as personnel acquired more experience. The nature of some of the early problems are described in Mr. Lee's report set forth in finding 39 (b) (1), *supra*. Several of plaintiff's former employees at the Lansdale plant were called as witnesses for the defendant to testify as to their observation of inefficiencies in the operation. Their collective views centered largely on such matters as improper installation and alignment of Government-furnished machines, and faults mostly of a minor nature which they attributed to one Gromada, the plant engineer at Lansdale. The testimony of these employees is discounted to some extent, however, because of their own lack of background and opportunity for informed observation, or an impression of hostility towards the late Gromada. Moreover, it is easy to overemphasize the effect of isolated mistakes on the overall pattern and thus to give such instances undue weight. No doubt many of the plaintiff's problems arose from its inexperience, but to attribute all of them to that cause would be to ignore the effect of the inadequate Government-furnished machines which compounded plaintiff's difficulties.

[fol. 325] 42. *Delivery failures by plaintiff's subcontractors.*

(a) All Metals became delinquent in deliveries of vent assemblies to the plaintiff. Because of this arrangements were made to divert to plaintiff 140 vent assemblies being manufactured by another company for the Rock Island Ordnance Depot, 40 of them being shipped to plaintiff on May 22, 1953, and another 100 on July 22, 1953. On July 17, 1953, plaintiff advised POD that All Metals was "progressing nicely" on the subcontract for chambers and vent assemblies. Plaintiff was assisting All Metals in getting under way in its subcontract, and All Metals was objecting to the pressures being applied on it to expedite deliveries. At the same time plaintiff complained to POD

that a Government inspector, by complimenting All Metals on its progress, was actually interfering with the plaintiff's efforts to stimulate All Metals to produce more rapidly, apparently on the theory that flattery promotes complacency rather than effort. By the end of July 1953 All Metals had invoiced plaintiff for only 18 vent assemblies, eight of which were subsequently rejected by plaintiff.

(b) On August 11, 1953, POD directed plaintiff to suspend further operations on the machine finishing of vent assemblies pending revision of drawings. This stop order was in force until rescinded on September 2, 1953, when POD notified plaintiff that it had decided not to make a change after all. All Metals was delayed another three weeks in September 1953 due to the failure of its steel supplier to deliver steel which complied with specification requirements. These were prime, but not sole, factors in All Metals' failure to meet its delivery schedule in August and September 1953, although Supplemental Agreement No. 7 to the prime contract referred to the stop order as having "drastically reduced Contractor's ability to make deliveries in August and in September 1953." In order to compensate for All Metals' failure, the plaintiff ordered 140 vent assemblies from the Lycoming-Spencer Division of Avco Manufacturing Corporation. These were charged to plaintiff at higher prices than All Metals' subcontract price and were shipped to plaintiff on October 22, 1953, with the understanding that plaintiff would return them in kind out of subsequent de- [fol. 326] liveries from All Metals, although there is no record of this having been done. The work stoppages on vent assemblies at All Metals in August and September 1953 due to the causes given above precluded deliveries of completed rifles by plaintiff to defendant in September 1953, and during that period plaintiff was accumulating completed gun barrels so that in October it was able to ship 137 completed rifles to defendant, using vent assemblies procured from Avco as aforesaid. Plaintiff's subcontractor Manalapan discontinued its operations in November 1953 for lack of funds, thus compounding plaintiff's problems.

(c) By December 5, 1953, All Metals was in such serious financial difficulties that it was unable to meet its payroll, and proposed a new delivery schedule for chambers and vent assembles at a higher price, plus a prompt payment by plaintiff of $10,000 to meet an immediate payroll in order to finish and ship about 70 chambers and 100 vent assembles then in the final stages. By then All Metals had invoiced plaintiff for a total of 261 chambers and vents. It is evident that All Metals' financial condition steadily worsened during the early months of 1954, and it was not only in trouble with its bank, but had a sizeable claim under a subcontract given it by Avco for vent assemblies under a prime contract which the Government threatened on January 18, 1954 to default, and which was in February 1954 terminated for convenience of the Government. In March 1954 All Metals was shut down for lack of cash to meet payrolls and material costs, and plaintiff was unable to pay $35,000 then owing to All Metals.

(d) In an effort to rescue All Metals and expedite deliveries in early April 1954 the plaintiff agreed to an increase in the subcontract price and to pay All Metals $35,000 plus another $9,000 later, while All Metals promised to deliver 200 chambers and 200 vent assemblies (minimum 100 of each) per month starting in May. Apparently the vents actually delivered by All Metals to plaintiff in the past were not uniformly up to specifications, for on March 31, 1954, All Metals credited plaintiff for 85 rejected vents. All Metals delivered only 18 vent assemblies in April and 578 thereafter, of which an undisclosed quantity were accepted subject to a deviation request since they failed to comply with specifications. On [fol. 327] April 28, 1954, the plaintiff advised POD that its failure to meet the April 1954 delivery schedule for guns was due to All Metals' failure to deliver chambers in March and April, which in turn was attributed to All Metals' financial difficulties. No reference to defective Government-furnished machines is assigned in this last-mentioned letter as a cause.

(e) All Metals attributes its difficulties to the Government's stop order and defective machines furnished by

the Government through the plaintiff. While these may have been minor contributing factors, its chief difficulties were inexperience, lack of "know-how", poor management and supervision, and inadequate financing.

43. *Conclusions.*

(a) Under the terms of the Facilities Contract, if the Government-furnished machines were delivered either late or not in fit operating condition, the plaintiff's only recourses were either to reject them or to request an equitable price adjustment in Contract 1213. The Facilities Contract precluded plaintiff from being reimbursed directly for the costs of repair, rehabilitation or restoration of the machines, or from recovering damages for their delay in delivery or delivery in unsatisfactory operating condition. It was thus incumbent on the plaintiff to estimate in advance as accurately as possible what it would cost to install and repair the machines, as well as the cost of special tooling. The difference between a repair and an item of special tooling is not always easily discernible. In general, an item of special tooling is a device which is used in conjunction with a basic machine in order to adapt it to the manufacture of a particular end product, as distinct from a component of the basic machine without which the machine will not operate satisfactorily for any purpose.

(b) Of $82,264 which defendant has verified was expended by plaintiff for dies, jigs, fixtures and special tools, the defendant concedes that $37,358.58 was properly chargeable to contract performance, because the contract provided the payment of this sum as the cost of special tooling which was to become the property of the Government. Originally the plaintiff had included $38,514 in its contract price for special tooling (estimated at $14 per rifle), which was to remain its property, but in [fol. 328] order to provide plaintiff with badly needed working capital the Government agreed to subtract $37,358.58 from the rifle price and set up special tooling as a separate item to be paid for, with the proviso it was to become the property of the Government. Of the $44,905.42 admittedly expended over and above the $37,358.58 which the Government concedes is properly chargeable, it can-

not be determined with any precision what part was spent for installation and repairs of Government-furnished machines (the plaintiff says $27,750.48), what part was spent for special tooling in excess of that contemplated, and what part was the cost of plaintiff's inefficiency and inexperience. From the record as a whole it is reasonable to conclude that the $82,264 was expended as follows:

$12,000—repairs and installation
60,264—special tooling
10,000—lost through inefficiency

(c) From the facts presented in findings 34 through 42, and other facts in the record, it is concluded as follows:

Collectively, the condition of the machines furnished by the Government to the plaintiff did not measure up to what the plaintiff might reasonably have anticipated under the promise of the Facilities Contract to furnish machines in fit operating condition, even though the parties contemplated machines which would need repairs, special tooling and accessories to be provided at the plaintiff's expense to perform Contract 1213. Knowing that the plaintiff had had no previous experience in this particular type of operation, it would seem incumbent on the Government to have furnished it machines which, while they might require initial repairs of a normal nature to place into operation, would not require the constant tinkering and involve the repeated failures and breakdowns which were experienced with some of the machines, even leading to the replacement of certain ones at a later time. The fact that some of the machines performed reasonably well if properly operated did not permit a smooth flow of production if other machines essential to a sequence of operations broke down. The defects in the machines in many cases were not such as could be detected upon visual examination alone at the time of delivery, for [fol. 329] the machines had to be installed and placed into operation before certain types of defects became apparent. Thus, it was not always possible for the plaintiff to invoke its right or perform its duty under the Facilities

Contract to reject defective machines upon delivery, although its complaints as to certain machines at later dates resulted in replacements. There is some support in this conclusion as to the overall condition of the machines in the continuous assistance and advice which the Government rendered to the plaintiff throughout the contract, in the generous modifications which the Government made to the plaintiff's delivery schedule, and in the apparent willingness to replace some of the machines. Reliance is also placed on the recorded complaints from the plaintiff set forth in finding 39(b), *supra*, the contents of which are not refuted or respondent to by contemporaneous communications from the Government. It is true that the troubles which the plaintiff experienced in the operation of the machines were compounded by certain inadequacies in their installation (finding 38, *supra*), and to a larger extent by the demonstrated inexperience and incompetence displayed by plaintiff's personnel in the installation and operation of such machines for the production of gun barrels (finding, 41 *supra*). Moreover, All Metals' failure to deliver subcontracted components (finding 42, *supra*) was at least of equal significance in the delays which plaintiff experienced and, of course, they are imputed to the plaintiff. To some extent the delays coexisted, so that even if the plaintiff had experienced no delays from defective machines, it would have been delayed by the failures of its subcontractors. There is no way to assess accurately the comparative effect of the various delay factors in terms of time or cost, but it is reasonable to conclude from the weight of the evidence that the defendant caused one-third of them and the balance was caused by plaintiff either directly or by imputation.

44. *Plaintiff's requests for reimbursement for machine repair costs.*

(a) Section 1 of Article II-A of the Facilities Contract (see finding 35, *supra*) authorized the contracting officer to make an equitable adjustment of the price and time of performance of the affected supply contract if the Gov- [fol. 330] ernment-furnished facilities were not delivered timely or in suitable condition and if the contractor re-

quested such an adjustment in writing. Prior to cancellation of Contract 1213, the plaintiff wrote to POD at least twice requesting reimbursement in one form or another (outright payment or renegotiation cost allowances) for specified costs allegedly in connection with putting the Government-furnished machines in working condition. See the letters reprinted in subparagraphs (2) and (6) of finding 39(b), *supra*. On August 26, 1954, plaintiff asked POD for reimbursement for all parts which plaintiff had purchased to make the machines workable, and on September 7, 1954, plaintiff supplied POD with schedules itemizing the cost of parts purchased for the machines and requesting "assurance that the monies represented herein will be paid to us." The total amount claimed was $28,646.41.[4] POD replied that it would take these requests under consideration and would advise plaintiff of a decision. After being prodded by the plaintiff for a decision, on October 28, 1954, POD advised plaintiff that "should future developments absolve your company of any wrong-doing and this District be authorized to effect a settlement with your company that we will at that time give full consideration to your claim or said expenditures along with any other termination claims you may allege as being brought about as a result of the cancellation of your contract." The defendant contends that plaintiff at no time during the period of contract performance requested an equitable adjustment in the contract price because of problems with Government-furnished machines, a contention which is accurate only if the written efforts for reimbursement made by plaintiff as related above are not construed to be equivalent to a formal request for an equitable adjustment. It is found, however, that the letters referred to above did amount in fact to a request for an equitable adjustment.

CONSEQUENCES OF PLAINTIFF'S PRODUCTION DELAYS

45. *Time Extensions.*

(a) The composite schedule in finding 14, *supra*, reflects the original delivery schedule for rifles and acces-

[4] A subsequent document gives this figure as $27,750.48.

[fol. 331] sories as amended by Supplements 3, 7 and 9 to the contract, against the actual deliveries, which when analyzed demonstrates that against the revised requirements the plaintiff was delinquent in deliveries during all but the first two of the 15 production months from April 1953 to July 22, 1954, when the contract was canceled,[5] and that the delinquencies ranged from 8 to 237 rifles and stood at 118 rifles at the time of cancellation, viz:

	Contract Revised Schedule	Actual Deliveries by plaintiff	Cumulative + or −
April 1953	----------	2	+2
June 1953	30	30	+2
July 1953	125	2	−121
August 1953	0	113	−8
September 1953	60	0	−68
October 1953	133	137	−64
November 1953	133	100	−97
December 1953	100	62	−135
January 1954	100	106	−129
February 1954	100	100	−129
March 1954	100	49	−180
April 1954	100	43	−237
May 1954	100	104	−233
June 1954	100	180	−153
July 1954	100	[1] 135	−118

[1] To July 22, 1954, when the contract was canceled.

The details of the time extensions granted and the need and requests therefor are presented in the succeeding paragraphs of this finding.

(b) Prior to award of the contract the plaintiff estimated that it would take about ten weeks to install the machine tools to be furnished by the Government and would commence production about March 15, 1953, so that it could meet the initial delivery requirement of 74 rifles in May and 233 each month thereafter to completion. Due to the causes already described the plaintiff had delivered only 324 rifles by the end of June 1953.

(c) On June 18, 1953, the plaintiff submitted for approval to POD a revised delivery schedule (see finding 39 (b) (3), *supra*), which postponed initial deliveries to

[5] These were, of course, cumulative delays. The delivery schedule shows that in six of the 15 months of contract performance the plaintiff exceeded the revised requirements *for that month.*

June and which would "enable us to complete our contract within the original completion period." The request attributed plaintiff's lack of deliveries to the Government's [fol. 332] failure to furnish machines in sufficient time and in proper condition, and plaintiff said that it would request no further extensions because it had by then sufficient Government-furnished machinery on hand to perform. On the same day POD approved the revised schedules and on August 11, 1953, the parties entered into Supplemental Agreement No. 3, antedated January 27, 1953, under which the quantities in the original contract were increased by 429 rifles and some spare parts and the delivery schedule was revised to conform to the schedule which the parties had agreed to on June 18, 1953. Supplemental Agreement No. 3 read in part as follows:

> WHEREAS, the parties have agreed to increase the quantity of Rifles (Item 1) to be delivered by 429 units and to add Spare Parts for same; and
>
> WHEREAS, the price for the Spare Parts shall be subject to Price Redetermination (Form IV) after complete delivery of same; and
>
> WHEREAS, the Contracting Officer has found and determined that the Contractor is entitled to a change in the delivery schedule applicable to the original contract item because the Government-owned facilities were delivered to the Contractor; and
>
> WHEREAS, the Contracting Officer has found and determined that due to late deliveries of Government facilities under Contract No. DA-36-034-ORD-1214 and the need for excessive repairs thereto, the Contractor is entitled to a change in the delivery schedule on subject Supply Contract;
>
> * * * *

One effect of this time extension was to relieve plaintiff of liability for non-delivery of 275 rifles by the end of June 1953 as per requirements of the original contract.

(d) On September 1, 1953 (All Metals' production of vent assemblies had been stopped since August 11 by a

stop order from POD pending a proposed change in finishing specifications) the plaintiff submitted to POD a proposed further postponement of the delivery schedule for rifles, which was withdrawn on October 16 when plaintiff substituted another schedule further postponing early deliveries but accelerating the completion date, citing as reason the failure of vent assembly deliveries from All Metals due to a stop order and steel supply problems. On October 21, 1953, plaintiff again submitted to POD another proposed revision of the delivery schedule which [fol. 333] was the same as that proposed on October 16 but eliminating from the latter deliveries for December 1953, citing as reason the unserviceable condition of certain machines furnished by the Government (see finding 39(b)(4), *supra*).

(e) By the end of November 1953 plaintiff was in arrears of delivering 703 out of 1,087 rifles required by the revised delivery schedule agreed to on June 18, 1953, and incorporated in Supplemental Agreement No. 3. It delivered 100 rifles in November and 62 in December 1953. Plaintiff was rightly concerned about the prospect of being charged penalties for non-delivery under the liquidated damages provision of the contract and was proposing that the clause be deleted. Instead, POD on December 17, 1953, advised plaintiff that such a proposal would require action by higher authority, and that in the meantime it contemplated reducing the delivery schedule requirements to 100 rifles per month at no increased cost to the Government. Said POD: "This should be a delivery schedule which you can make and if you do make it the penalty clause will not take effect. As you can see, this then would have the same effect as removal of the penalty clause." As will be seen in the next paragraph of this finding, Supplemental Agreement No. 7 to the contract which was the ultimate form of the next official time extension did not have the effect of waiving late deliveries of rifles required to be delivered prior to August 1953 under Supplemental Agreement No. 3.

(f) Supplemental Agreement No. 7, dated January 27, 1954, further revised the delivery schedule. Its effect was to require the delivery of 481 rifles by the end of November 1953 (by which time plaintiff had delivered

384 rifles), and 100 per month thereafter, thus relieving plaintiff of liability for 1,105 rifles which, by the end of January 1954, were in default under the revised schedule in Supplemental Agreement No. 3.[6] The reasons assigned [fol. 334] by Supplemental Agreement No. 7 for the modification of delivery requirements were as follows:

> WHEREAS, the Contractor was directed by the Government on 11 August 1953 to suspend the finish machining operation of breech lock vent openings pending revision to Drawing C7229964; and
>
> WHEREAS, said stop order has since been revoked; and
>
> WHEREAS, said stop order drastically reduced Contractor's ability to make deliveries in August and in September 1953; and
>
> WHEREAS, the deliveries required of the Contractor for the months of October and November 1953 were cut to 133 per month by a Government directive from Watervliet Arsenal; and
>
> WHEREAS, the Government has further ordered that beginning with December 1953 the minimum monthly deliveries shall be at 100 units till completion of contract; and
>
> WHEREAS, the parties have agreed that the delivery schedule in the contract shall be revised to reflect the above at no change in contract price.

(g) Prior to cancellation of Contract 1213, the defendant considered the possibility of a termination for default, but concluded that "the delinquent delivery of items

---

[6] The defendant erroneously stated in its requested finding No. 39 (to the Commissioner) that Supplemental Agreement No. 7 revised the picture of actual v. required deliveries, so that as of November 30, 1953, the plaintiff had delivered 384 rifles and was required to deliver 326, and the plaintiff employs this erroneous computation as a basis of demonstrating that plaintiff was not delinquent up through March 30, 1954. The error made by plaintiff is in not recognizing the fact that Supplemental Agreement No. 7 did not effect a change in the then existing delivery requirements for the months prior to August 1953.

could be considered excusable or corrected by the contractor within a ten-day period."

46. *Liquidated Damages.*

(a) On December 16, 1953, the plaintiff requested POD to eliminate from Contract 1213 the Liquidated Damages provision, quoted in finding 15, *supra*. On December 17, 1953, POD advised plaintiff that its request was beyond POD authority and required action by higher headquarters, where its approval would be unlikely. As an alternative POD mentioned the possibility of a substantial modification of the delivery requirements which, if plaintiff would meet the changed schedule, "would have the same effect as removal of the penalty clause [i.e., liquidated damages clause]." This modification was later adopted in the form of Supplemental Agreement No. 7 of January 27, 1954, described in finding 45 (e) and (f), *supra*.

(b) Supplemental Agreement No. 7 was the last modification of the delivery requirements for rifles prior to [fol. 335] the suspension of Contract 1213 on July 22, 1954. During the performance period the plaintiff delivered a total of 1,163 rifles. Late deliveries by plaintiff under the delivery schedule as ultimately revised by Supplemental Agreement No. 7 resulted in an assessment of liquidated damages of $55,568.25 on Item 1 (rifles) and $747.83 on Item 2 (accessories), or a total assessment for liquidated damages of $56,316.08. Liquidated damages deducted from the payments made to plaintiff for delivered items totaled $53,715.19, of which $1,700.34 represents an erroneous overcharge. Recomputation of the liquidated damages schedule indicates another overassessment of $286.53 for which the Government has not given the plaintiff credit.[7] Liquidated damages appli-

[7] Despite the fact that the plaintiff conceded the mathematical correctness of the liquidated damage schedule placed in evidence by the defendant, the court has corrected mutual mistakes. Thus, the $286.53 error referred to involves the requirement of the revised delivery schedule that 100 rifles be delivered in March instead of 102 on which the defendant's computation erroneously is based. This affects the liquidated damages chargeable for March 1954 and subsequent months.

cable to items delivered by plaintiff but for which no payments have been made by the Government total $4,301.23.

(c) On May 20, 1954, the plaintiff addressed a letter to the Comptroller General through POD which may be fairly construed not only as a complaint over the presence in the contract of a liquidated damages clause but also as a request that it be relieved of the assessment of liquidated damages either by forgiveness or by deletion of the clause. Plaintiff's contention therein that the inclusion of the clause in the contract was contrary to the preaward oral agreements is not supported by evidence. The letter contains no reference to the effect of Supplemental Agreement No. 7 as a mitigant of liquidated damages. There is also a puzzling inference that the reduction of the monthly delivery schedule to 100 without a 5 percent increase in unit prices for the stretched-out deliveries was an imposition on the plaintiff, although the reduction in delivery requirements actually conferred a substantial benefit on plaintiff by forgiving most of its past delinquencies and corresponded more realistically to the average of plaintiff's erratic production record to that time. On May 28, 1954, POD accepted plaintiff's letter of May 20 as an appeal for relief from liquidated damages but [fol. 336] held it in abeyance instead of processing it to the Comptroller General, advising plaintiff that the appeal was addressed to equitable rather than legal considerations and thus would not be cognizable by the Comptroller General. On June 21, 1954, plaintiff advised POD that, if it could not be relieved of liquidated damages by the Ordnance District, then it wished its earlier request for such relief to be forwarded to the Comptroller General. There is no record of the plaintiff's letter of May 20, 1954 ever having been forwarded to the Comptroller General by POD. Beyond the documents referred to or quoted from in this report, there is no record that the plaintiff at any time after January 25, 1954 filed with the contracting officer a specific request for a decision by the latter of the causes of plaintiff's delay in deliveries either under the liquidated damages or the disputes clauses of Contract 1213.

CONTENTIONS AS TO CAUSES OF CONTRACT CANCELLATION

47. *Cancellation.* On July 22, 1954, POD directed plaintiff to suspend all production under Contract 1213, emphasizing that the order was not "to be construed as a termination of this contract either for convenience of the Government or for default." On August 18, 1954, POD notified plaintiff that Contract 1213 was canceled for unspecified "statutory violations", and that since these alleged violations and their effect on the Government's rights under the contract were under study by the Army and the Department of Justice any future payments would be "handled in accordance with procedures for handling claims of a doubtful nature arising under such contracts." In essense, the plaintiff contends that the defendant's prime but unadmitted motivation in canceling the contract was the discontinuance of military requirements for the 75 mm. rifle as an obsolete and superseded weapon, and that POD's excuse of "alleged statutory violations" was a convenient pretext to avoid the high costs prospectively attending a termination for convenience of the Government. The status of requirements for the rifle as well as the status of defendant's knowledge of statutory violations as they existed on July 22, 1954, thus become pertinent subjects of inquiry in order to determine their causal relationship to the cancellation.

[fol. 337] 48. *Need for 75 mm. rifles.* On June 16, 1954, the office of the Chief of Army Field Forces questioned the effectiveness of the 75 mm. rifle and requested permission from the Assistant Chief of Staff, G-3, to eliminate it from the Army weapons system. On June 17, 1954, G-3 approved the request submitted by the Chief of the Army Field Forces. Between then and July 6, 1954, an officer from the office of the Assistant Chief of Staff, G-4, requested Lt. Colonel Martin Raines to estimate the cost to terminate production of the 75 mm. rifle, then being produced only by plaintiff. This was the first knowledge by the Ordnance Corps that the Army staff level was considering the elimination of the 75 mm. rifle. On July 6 or 7, 1954, the Ordnance Corps received a directive from G-4, dated July 2, to take steps to terminate

production of the 75 mm. rifle. The Ordnance Corps did not agree with this decision and General Medaris authorized Lt. Colonel Raines to endeavor to obtain a reversal. The Ordnance Corps' reasons for not wanting to terminate production of the weapon were two-fold: the high cost of termination (estimated at $300,000), and the belief that the BAT 106 rifle, which was to supersede the 75 mm. rifle, was not sufficiently advanced in production to warrant phasing out the 75 mm. rifle. Because plaintiff had an outstanding V-loan, it was necessary to obtain financial coordination with the Chief of Finance before deciding upon termination for convenience. Accordingly, a financial coordination conference was held on July 15, 1954, and on July 16, 1954, the Ordnance Corps requested G-4 if it should still proceed with the prior directive of July 2, 1954, to terminate procurement of the 75 mm. rifle. Meanwhile, Lt. Colonel Raines, with General Medaris' knowledge, had held a series of verbal discussions with G-4 to persuade the retention of the 75 mm. rifle in the weapons system. By communication dated July 21, 1954, G-4 reaffirmed the decision to cancel production of the 75 mm. rifle, and thus ended the Ordnance Corps' efforts to retain the weapon. The final decision by G-4 to deny the Ordnance appeal and to terminate production on the 75 mm. rifle was thus reached after General Medaris' decision on July 13, 1954 to cancel Contract 1213 because of plaintiff's activities that were suspected of fraud.

[fol. 338] 49. *Precancellation intelligence of contract irregularities.* Between April and July 1954 the Federal Bureau of Investigation received, investigated and reported information relating to the Gunn Engineering Company (findings 20 and 21, *supra*), and the kick-back activities of certain of the plaintiff's subcontractors as described in findings 18 through 25. This information became known to the Ordnance Corps and was discussed between General John B. Medaris, then Assistant Chief of Ordnance and Chief of its Industrial Division, and Albert C. Lazure, General Counsel of the Ordnance Corps. Mr. Lazure had previously learned in December 1953 that plaintiff had hired Tucker, Jr., for he had seen the copy of Tucker's employment agreement filed by

plaintiff with the Rock Island Arsenal in connection with plaintiff's Ordnance Contract 8580 (see finding 8(b), *supra*). This background information, plus the data from the FBI investigation, was augmented by additional information resulting from an investigation in progress by the General Accounting Office into the general contingent fee activities of the Tucker father and son associates.[8] General Medaris and Mr. Lazure had received reports collectively concerning the payment of gratuities by plaintiff to Government employees, the charging of personal expenses to the contract, the plaintiff's excessive requirements for technical assistance from Watervliet Arsenal, and plaintiff's inability to operate Government-furnished machines which Ordnance considered to be adequate in qualified hands. They had formed the impression that the situation had begun to "smell bad" and had the "flavor of contractual irregularities". These matters were the subject of a conference held on or about July 12, 1954, between General Medaris, Lt. Colonel Raines and Mr. Lazure, at which the latter advised that from a legal standpoint the plaintiff's contract could be canceled for its activities in violation of statutes relating to contingent fees, kickbacks, false claims and conspiracy, as well as common law fraud. As a pre-[fol. 339] liminary to cancellation the following teletype message was sent by Ordnance to Watervliet Arsenal on July 13, 1954:

> Re Contract DA-36-034-ORD-1213R. Information received by this office indicates possibility of contract irregularities concerning certain individuals associated with Acme Coppersmithing. In view thereof contractor should be notified immediately that Government will not accept any additional rifles produced by Acme. Inspection and acceptance of items

[8] Plaintiff correctly contends that the record is not specific as to the precise source and scope of the Ordnance Corps' knowledge prior to July 22, 1954, of data developed by the FBI and GAO. It is clear, however, that officials of the Ordnance Corps had enough knowledge to arouse their suspicions, and if the later perfection of their knowledge were to have legally justified their concellation action, then the only point to the plaintiff's objection would go to the determination of the controlling motive for cancellation at the time.

> manufactured by this contractor should stop immediately. Detailed instructions will be forwarded your arsenal outlining the method to be followed in cancelling this contract. Under no circumstances will this contract be terminated for either convenience or default.

On July 21, 1954, the following teletype message was sent by Ordnance to Watervliet Arsenal:

> * * * Take immediate action to effect work stoppage pursuant to referenced TT. Detailed instructions will be forwarded your arsenal outlining the method to be followed in cancelling the contract. Under no circumstances will contract be terminated for either convenience or default.

The actual suspension itself occurred on July 22, 1954, as described in finding 47, *supra*.

50. *Conclusion as to cause for cancellation.*

(a) It is reasonable to conclude that as of July 22, 1954, there existed simultaneously two reasons of equal validity in the view of the Army to cancel Contract 1213: the termination of military requirements for the 75 mm. rifle, and the suspicion of plaintiff's fraud, with particular emphasis on the Gunn Engineering Company situation, as related in findings 20 through 25, *supra*. Either one of these reasons would have resulted in cancellation in absence of the other, but each was arrived at independently. Whether right or wrong, the election by the Army to cancel the contract for alleged statutory violations instead of terminating it for convenience of the Government was not controlled by considerations of termination costs, but rather by the Army's interest in promoting morality in public procurement. The time sequence of events described in findings 48 and 49 bears [fol. 340] out this conclusion. There was a calculated risk in the Army's election to cancel for cause, for if the grounds proved to be invalid the Government would then face the risk of ultimately paying damages for breach of contract, a cost conceivably greater than the allowances provided under the normal termination for convenience formula. And if the grounds were ultimately valid so

that the plaintiff would forfeit any recovery, the plaintiff's resultant financial predicament would jeopardize the security of its V-loan underwritten by the Government, and accordingly cause the Government a prospective loss.[9] It is, of course, obvious that, had it not been for the termination of the Army's requirements for the 75 mm. rifle, the defendant might have elected to take over the contract and complete it, but it is not clear that this would have benefited plaintiff.

(b) All Metals was suspended from the Army list of eligible bidders as a result of its "implication in the fraudulent situations", but plaintiff was not. Plaintiff's counsel was advised in January 1956 by POD that it was not considered to be in disrepute in Government circles. The criminal indictment against Tucker, Norris and Epstein for conspiracy alleged in pertinent part as follows:

> 5. It was the plan and purpose of the said conspiracy that James Samuel Norris and Harry King Tucker, Jr., defendants, would utilize, take advantage of, and trade on their positions as employees of Acme to approach persons who sought subcontracts and order from Acme for supplies, materials, equipment and services to be used by Acme in the performance of the above mentioned prime contract, and to solicit fees, commissions, gratuities and compensations from such persons as an inducement for the aid of the defendents in obtaining and procuring the award of such subcontracts and orders.

PRICE REDETERMINATION

51. *Contract provisions.* Provisions of Contract 1213 relevant to price redetermination provided ultimately that, after completion of delivery of 30 percent of the rifles, the prices of rifles and spare parts could be in- [fol. 341] creased retrospectively and prospectively to a ceiling of 115 percent of contract target price, and the prices of accessories, tools and equipment which plaintiff

[9] The proof required to attribute base motives to responsible military and civilian officials of the Department of Defense should be at least as conclusive as that required to establish fraud on the part of a Government contractor.

was to manufacture could be increased to a ceiling of 110 percent of contract target price. The redetermined prices were to be reached after negotiations based upon submission of data by plaintiff, all as prescribed in the relevant contract provisions. The data was to be submitted by plaintiff within 30 days after 30 percent of the rifles had been delivered. The target and ceiling prices (as revised) are as shown in the following schedule:

Item No.	Description	Ceiling	*Target Price*		*Maximum Price*	
			Total	Per Unit	Total	Per Unit
		Percent				
1	Rifles	115	$868,128.58	$315.57	$998,347.87	$362.90
2	Accessories	110	73,488.00	26.71	80,836.80	29.38
3	Spare parts	115	64,812.34	23.56	74,534.19	27.09
4	Special tooling	110	37,358.58	----------	37,358.58	----------
					1,191,077.44	

52. *Submission of allegedly false claims via price redetermination.*

(a) On July 23, 1953, by which time plaintiff had delivered only two rifles out of 2,751, POD requested plaintiff to submit cost data for price redetermination purposes. Plaintiff promised to provide the data by November 27, 1953. Not having received it, POD renewed its request on December 4, 1953, in response to which the plaintiff wrote that it would furnish the data in March 1954 by which time it expected to have completed the 30 percent of deliveries prerequisite to price redetermination proceedings. On April 29, 1954, plaintiff submitted statements reflecting its cost of performance of $1,179.29 per rifle through December 31, 1953,[10] and its estimated cost to complete of $453.31 per rifle, compared to the contract ceiling price of $362.90. The costs submitted by plaintiff include all of its unanticipated costs such as those for delay.

(b) The schedules accompanying plaintiff's submission of cost data on April 29, 1954 contained without specific designation certain cost items which the defendant con-

[10] 446 rifles had been delivered by December 31, 1953.

[fol. 342] tends were false claims for expenditures not property chargeable to performance of Contract 1213, viz:

(1) Subcontract costs of All Metals, Manalapan, Nicholson Products Company and Foley Machine Company which included a 5 percent allowance for the services rendered the subcontractors by Tucker and/or Norris in procuring the subcontracts from plaintiff, as related in findings 18 through 25, *supra.*

(2) The $12,000 inflation in All Metals' subcontract price to plaintiff involving the Gunn Engineering Company, as related in findings 20 and 21, *supra.*

(3) The $470 plus hotel expenses paid by plaintiff to Mr. Lee, an employee of Watervliet Arsenal, for his services, as related in finding 33, *supra.*

(4) The $1,045.52 charged by Norris against Contract 1213 for services rendered by plaintiff's employees on Norris' farm, as related in finding 26, *supra.*

(5) Minor hotel, meal and entertainment charges for Government employees, including Hochstuhl, as related in finding 32, *supra.*

(6) Payments of salaries and/or commissions to Tucker by plaintiff.

The cost data was submitted for purposes of price redetermination, and the contract ceiling price was vastly less than the plaintiff's actual costs per unit even with the exclusion of the costs which defendant contends were not properly chargeable to the contract. Moreover, by letter of July 16, 1954 (six days prior to contract cancellation), the plaintiff's accountant advised POD of the reason why he could not certify the costs submitted on April 29, 1954, and that he had not corrected certain errors that he knew plaintiff had made in charging costs to the contract because the errors would be relatively small and, even if eliminated, would leave plaintiff with costs greatly in excess of the contract ceiling price. The Army Audit Agency audited the plaintiff's cost submission but its report is not in evidence.

(c) On July 16, 1954, the plaintiff's accountant submitted to POD plaintiff's cost data on rifles for the period January 1, 1954 to June 30, 1954, showing a cost per

gun of $690.21 even after eliminating of certain direct [fol. 343] costs of tools and dies, and miscellaneous expenses. Plaintiff's accountant again said that he could not certify the costs as being entirely accurate because he was not present at the taking of physical inventories, but felt that the costs submitted were essentially correct. The per unit cost was so greatly in excess of the contract price that the Army Audit Agency felt it was not necessary to audit the plaintiff's costs for this later period. On July 16, 1954, the plaintiff certified that it had negotiated a repricing settlement agreement with the defendant's representatives whereby the contract price of rifles was increased to the contract ceiling price of $362.90 each, subject to approval of the contracting officer, which approval was never forthcoming because the contract was canceled in the meantime. However, on July 28, 1954 (six days after contract suspension), the defendant's Board of Awards approved the increase of rifle prices to the contract ceiling price, basing its decision on the recommendation and reasons of the defendant's Price Analyst who had reported that the ceiling price was less than that of any other producer of the item.[11]

(d) Under date of April 11, 1955, Army Ordnance advised GAO that because of the price redetermination possibility which apparently was still alive, the Army was reserving $54,894.22, which was in addition to $21,411.64 being held for possible use in payment for items delivered prior to cancellation, in the event plaintiff's claim was not subject to forfeiture. At this time Army Ordnance had been given interim advice by the Department of Justice that no civil or criminal cause of action lay against plaintiff, and Ordnance was seeking the advice of GAO as to whether the cancellation for cause action of July-August 1954 could be converted into a termination for convenience of the Government, thus indicating a prevailing uncertainty on the part of Army Ordnance as to the legal sufficiency of the grounds upon which the contract had been canceled for cause.

---

[11] It would appear that the Board of Awards was not aware that the contract had been suspended six days earlier, for their action was superfluous in the then existing circumstances.

RETURN OF GOVERNMENT PROPERTY

53. (*a*) *Plaintiff's refusals to return property.* On August 25, 1954, POD notified plaintiff that it intended to [fol. 344] remove all government machine tools and equipment in plaintiff's possession under Facilities Contract 1214, and requested permission to send a packaging contractor to the Lansdale plant to prepare the property for shipment. On August 26 plaintiff instructed its subcontractors not to release any machinery or tools to the Government and notified POD as follows:

> * * * The matter which you suggest in your letter is not quite as simple as the two paragraphs you have written. First, before withdrawing any Ordnance owned machine tools and equipment now in our possession, we wish to be reimbursed for all parts that were purchased personally to make the machines workable under both contract numbers. We have a complete list of all gears, tables and extra necessary fixtures for each and every machine. It would be foolhardy to pack these machines and strip them of the necessary working parts, which was done by the Government previously when we took in the Ordnance owned machine tools and equipment.
>
> After the evaluation has been established and OK'd for payment, we do not see any need for sending in an Ordnance Packaging Contractor for the purpose of removing the Government equipment, since we are definitely capable of doing same.

On September 7, 1954, plaintiff wrote the following to POD:

> Enclosed please find two copies of parts that were purchased for the various machines rented to us by the Government.
>
> As pointed out to you in a previous letter, the parts contained herein were the necessary pieces of equipment required to make the machines functional and were missing upon receipt of the various machinery shipped us. As explained to you over the telephone, the monies shown on the individual sheets

> were the actual out-of-pocket expenditures on our part. Before shipping the apparatus, as per your instructions, we would appreciate assurance that the monies represented herein will be paid to us.

Findings 36, 39 and 40, *supra*, describe the machines and the repairs and additions made to them by plaintiff. POD promised to take plaintiff's request for reimbursement under consideration and renewed its request for permission to enter plaintiff's plant and prepare the machines [fol. 345] and other Government property for shipment. Plaintiff expressed its willingness to comply with POD's request if given suitable assurances of reimbursement, to which POD responded on October 28, 1954 that since cancellation of the contract it lacked authority to pay or promise to pay, but that "should future developments absolve your company of any wrongdoing" the claim for reimbursement would be considered along with plaintiff's other termination claims.

On November 5 plaintiff briefly granted permission for POD to remove the machines, but before this could be done the plaintiff reimposed the prohibition on November 10 because of a purported lack of cooperation on the part of the defendant in entertaining plaintiff's claims. In effect plaintiff wanted a *quid pro quo*, and believed that "the only way any consideration will be given this company is if we adopt the same measures the Government is adopting with us."

(b) *Plaintiff authorizes removal.* The Government prepared to file suit to recover its machines and tools, and on February 2, 1955, the plaintiff voluntarily capitulated by authorizing the Government to remove its equipment, requesting "a reciprocal spirit of cooperation on the part of the Army" in the form of money because of plaintiff's threatened bankruptcy and its "desperate need of immediate assistance." Arrangements were made to remove the property commencing February 10, 1955, and on February 7 POD advised plaintiff as follows:

> Previous inspection of Machine Tools at your plant has indicated that the majority were equipped with contractor owned accessories and tooling, such as spe-

cial heads, guides, bearings, motor controls, gages, etc. Since the Government cannot be responsible for this property after removal of equipment, it is recommended that it be removed prior to plant clearance date.

On February 9, 1955, POD advised plaintiff as follows:

> This will confirm telephone conversation today concerning removal of contractor-owned accessories and tooling from Government-owned machine tools. Since you have indicated that you will be unable to remove this Contractor-owned equipment prior to plant clearance date, it is agreed that E. A. Gallagher and Sons will undertake this task. It is understood, however, [fol. 346] that since the Government is relieving your Company of this work, any property damage incident to this removal will be at Contractor's risk and that the Government and/or E. A. Gallagher and Sons will be relieved of any liability.

(c) *Removal from All Metals accomplished.* Arrangements were also made in January and February 1955 to remove Government property from the premises occupied by Manalapan and All Metals, and a removal was accomplished from All Metals' plant without delay.

(d) *Counterclaim for unreturned property.* After the Government had regained possession of its machines and certain special tooling which had become Government property by virtue of contract provisions (Clause 36 of General Provisions, and Supplemental Agreement No. 6), there remained unreturned some additional tooling as to which plaintiff admits liability in the amount of $6,205.55, which is the subject of a counterclaim by the defendant. In view of the plaintiff's admission of liability it is not essential to mention that the additional tooling was apparently at the time on the premises occupied by Manalapan (which Manalapan denied) and became the subject of a protracted but fruitless exchange of correspondence between the parties from February 1, 1956 to July 12, 1956, in an effort to recapture the tooling or its value.

(e) *Counterclaim for scrap.* The plaintiff also concedes liability for the defendant's counterclaim in the

amount of $1,117.94, representing the scrap value of gun tubes furnished plaintiff by defendant, and in plaintiff's possession at time of contract cancellation.

POST-CANCELLATION ADMINISTRATIVE PROCEDURES (OTHER THAN PRICE REDETERMINATION)

54. *Recital.*

(a) On November 15, 1954, Mr. Lazure, General Counsel of the Ordnance Corps, advised the Army Judge Advocate General of the circumstances which induced cancellation of Contract 1213, and then stated as follows:

> 4. Subsequent to the cancellation, Acme presented a plan for payment in order that a V-loan obtained by the Company could be liquidated by approximately [fol. 347] $85,000. In this regard, this office, consistent with the practice of securing advice from your office and the Department of Justice in matters concerning fraud or suspicion of fraud, requested advice on the possibility of making payments to liquidate the V-loan balance. Reference b. advises that the Department of Justice has considered the matter and determined that no objection would be raised provided there is a prior execution by Acme of an agreement that acceptance of the proposed plan of payment would be without prejudice to any rights of the Government arising out of this case.
>
> 5. This office has considered the entire matter concerning payments to Acme Coppersmithing under Contract ORD-1213R and has determined that it would be consistent with the original decisions of this office concerning cancellation of this contract and decisions of the Comptroller General as indicated above to recommend no further payments to this Company until such time as the matter under consideration by the Department of Justice has been concluded.

(b) Plaintiff's representatives repeatedly requested Mr. Lazure to expedite action on the release of contract funds. By December 15, 1954, the Department of Justice had

advised the Army Judge Advocate General that, although it had not completed its study, it believed that the only civil fraud action that would lie against plaintiff would be the possible withholding of $15,000 under the Anti-Kickback Act, and it had concluded that no criminal prosecution of Acme (as distinct from other firms and individuals) would be warranted. On December 15, 1954, Mr. Lazure gave a status report to General Medaris which closed with the following recommendation:

> * * * Inasmuch as the Department of Justice has made certain determinations with respect to Acme and it now appears that action will not be entertained against the Company, it is suggested that prior to closing this case by the Ordnance Corps, in light of the decision of the Department of Justice, the Ordnance Inspector General be requested to make a complete review of this matter. In the past the Ordnance Inspector General has conducted considerable investigations concerning this matter at the Philadelphia Ordnance District. A complete review of the situation by the Inspector General will provide a basis whereby the Ordnance Corps may in all fairness to the contractor and in the interest of the [fol. 348] Government make final decisions as to the disposition of this case.

(c) On December 16, 1954, at Mr. Lazure's recommendation, General Medaris advised plaintiff's attorneys that plaintiff could file a claim with the General Accounting Office.

(d) On March 8, 1955, General Medaris summarized the complex situation for the Army Judge Advocate General. After claiming that its position was legally sound and that plaintiff could apply to the General Accounting Office for relief, the Ordnance Corps document stated as follows:

> Although it is considered questionable by this office that payment can be made under a cancelled contract, and in light of 28 U.S.C. 2514 the question of payment for items delivered prior to cancellation has been resolved in favor of the contractor by preparing vouchers for those items and submitting same

through appropriate channels to the General Accounting Office for direct settlement. In addition, the record of price redetermination of items delivered prior to cancellation and recommendations thereto will be submitted to the General Accounting Office for direct settlement.

* * * *

Here again, attention is invited to the forfeiture or fraudulent claim statute 28 U.S.C. 2514 * * * as indicated * * * it is the position of the Ordnance Corps that the cancellation of subject contract should stand and the contractor should be left to his legal or administrative remedy.

The memorandum also stated at another point as follows:

* * * In addition, there was a possibility that the matter could come within the purview of the Federal statute which prohibits kickbacks (41 U.S.C. 51). However, since this contract was fixed price with price redetermination, a decision as to whether this type of contract can be construed to be a cost reimbursement contract has to be made. It is the understanding of this office that the official position of the Department of the Army is that contracts of this nature are not to be construed as cost reimbursement.

Following out the statement of intention in the foregoing document, on April 22, 1955, the Army submitted to the General Accounting Office vouchers for rifles shipped by plaintiff prior to cancellation in the net amount of $18,-[fol. 349] 810.75 (after deductions totaling $9,969.02 and a credit of $1,700.34 for an overassessment of liquidated damages).

(e) In a communication dated April 11, 1955, to the General Accounting Office, Mr. Lazure recited the background of the case, stated that the Department of Justice had advised the Army that no civil or criminal cause of action existed against plaintiff (not so as to other firms or individuals implicated and still under investi-

gation), mentioned that POD was reserving certain funds totaling $76,305.86 for claims including price redetermination claims if they were eventually to be allowed, and then stated as follows:

> 5. In connection with the cancellation of subject contract, this office at the insistence of Dep Log and OJAG is preparing a draft of a submission for the signature of the Assistant Secretary of the Army to the Comptroller General requesting a determination as to whether the cancellation of this contract for cause under the common law can be converted to a termination for convenience of the Government in the event the matter concerning this contractor and subcontractor as well as the individuals concerned is concluded by the Department of Justice. * * *.

(f) On June 2, 1955, the Army wrote to the General Accounting Office requesting advice as to the propriety of treating the rescission or cancellation of Contract 1213 as having been terminated for convenience of the Government for the purpose of determining the rights and obligations of the parties. In this communication the Army discussed at some length the prerequisites, ramifications and legal considerations involved in termination for convenience of the Government, termination for default, and rescission or cancellations for irregularities, with particular emphasis on the latter. It is evident that at this point the confidence on the part of the Army in the correctness of its action in canceling Contract 1213 was seriously undermined by the advice of the Department of Justice that "neither civil action nor criminal prosecution against Acme or All Metals, Inc., a subcontractor, is warranted.", although prosecution against certain employees of Acme had been recommended. The letter also mentioned that the Army had already sent to the General Accounting Office for direct settlement a voucher presented by plaintiff for $18,810.75 covering items delivered [fol. 350] prior to contract cancellation, and a request for reimbursement of $54,394.22 for a price redetermination negotiation.

(g) As of August 29, 1955, the General Accounting Office felt that its information concerning the claim was

not sufficient to render the Army the advice sought by the latter in its request of June 2, 1955, and it had undertaken an investigation of its own. It is not known how much of the information in the possession of the Army and its component organizations had been made available to the General Accounting Office by this time. The Army was apparently considering the idea of converting the cancellation action into a termination for convenience of the Government, withholding from termination payments a sum to cover "the maximum possible adjustment due the Government under the covenant against unauthorized commissions or fees paid or agreed to be paid for securing the Government contract," and then permitting the Armed Services Board of Contract Appeals to rule upon the withheld items on application by plaintiff.

(h) The General Accounting Office conducted a comprehensive investigation of the "five-percenter" activities of the Tucker father-and-son team covering not merely their employment by the plaintiff, but their participation in the procurement of 35 Government contracts for 19 firms starting in early 1951. On March 16, 1956, the Comptroller General furnished the Secretary of the Army an extensive report covering the Tucker activities referred to. There were many similarities and some differences in the arrangements between Tucker, Jr., and the plaintiff on the one hand, and between the Tucker group and various other companies in the Government contract field. The Comptroller General reported what seem to be parallels in the type of employment contracts the Tuckers entered into with their various clients, in the double commission deals which they procured for themselves by means of obtaining subcontracts for their clients from contractors who were also their clients, and in the common inability of the contractors they represented to perform the contracts which were purportedly procured through the services of the Tuckers. (These observations are based entirely on the report of the Comptroller General, and are of course not entitled to any more weight than hearsay is normally accorded in a judicial [fol. 351] proceeding, for the record in the instant proceedings contains no evidence of probative value on these collateral matters.) The following relevant passages are

quoted from the report in question in order to reflect the advice given by the Comptroller General to the Army as to both factual and legal aspects of his views resulting from the investigation made to that time:

> The Acme Coppersmithing & Machine Company's employment of Harry K. Tucker, Jr., was not previously investigated by our Office. It now appears that there was no misrepresentation concerning such employment and that Harry K. Tucker, Jr., might have qualified as a full-time employee since he worked at the Lansdale Plant of Acme Coppersmithing & Machine Company where he was placed in charge of sales and Government contracts. Thus, it is questionable whether there was any breach of the contingent-fee covenants in the contracts of that company.
>
> In regard to the cancellation of contract No. DA-36-034-ORD-1213(R), the record now shows that James Samuel Norris, Harry K. Tucker, Jr., and Jack Epstein, employees of Acme Coppersmithing & Machine Company, were indicted for conspiracy to solicit fees, compensations, etc., as an inducement for award or an acknowledgment of the award of subcontracts or orders. We have ascertained that Jack Epstein, son of Acme's president, Joshua Epstein, was associated with Tucker and Norris in the operation of the Lansdale Plant and that an agreement was executed between Tucker and Norris on the one hand and Acme on the other providing for a distribution of profits made at Lansdale Plant on the following basis: 50 percent to Acme; 25 percent to Harry K. Tucker, Jr., and 25 percent to James S. Norris. Hence, there appears to have been a closer relationship between the company and these employees than normally would be the situation where apparent violations or attempted violations of the Anti-Kickback statute, 41 U.S.C., 51-54, have been disclosed.
>
> * * * *
>
> * * * The Department of Justice has apparently taken the position that Acme's civil liability under the Anti-Kickback statute cannot be considered as

amounting to more than the sum of $14,600, representing the total of the amounts paid to Gunn Engineering Company or to the employees of Acme by subcontractors under contract No. DA-36-034-ORD-1213(R), which is essentially a cost-reimbursable contract since it provides for price redetermination [fol. 352] based upon increases or decreases in costs of performance.

* * * *

There has been no indication that the contractor delivered or intended to deliver supplies which were different in substance from those contracted for. Further, it appears that at the time contract No. DA-36-034-ORD-1213(R) was canceled, the Government was in a position to ascertain the probable extent of the damages likely to be sustained as the result of the fraudulent actions of the employees or "partners" of the Acme Coppersmithing & Machine Company, and to have protected itself against the payment of excessive charges for the supplies delivered or to be delivered under the contract.

Moreover, the Anti-Kickback Act is directed primarily against the payers and recipients of the illegal fees, commissions, etc., and the statute appears to imply that a prime contractor's responsibility in such matters should not generally be determined on the basis of the rule adopted in various criminal cases that a corporation may be held liable for the acts of an agent within the scope of his authority. *United States* v. *George F. Fish, Inc.*, 154 F.2d 798).

* * * *

In the circumstances—and since our investigation has disclosed that Acme discharged James S. Norris in the early summer of 1953, and terminated Tucker's and Epstein's employment when it learned of the full scope of the FBI investigation of kickbacks from some of Acme's subcontractors—you are advised that we perceive no objection to treatment of the contract as having been terminated for the convenience of the Government. Otherwise, consistent with the principle that rescission has the effect of annihilating a contract so effectually that in contemplation of law it

has never had any existence, we would appear to be required to disallow any outstanding claims of the contractor as for unliquidated damages which cannot be paid out of appropriated funds.

In the event that the contract is terminated for the convenience of the Government, we would be in a position to authorize payment on the outstanding claim of the contractor in the amount of $18,810.75, with the understanding that the amount of the kickbacks involved in the award or acknowledgment of subcontracts or orders under contract No. DA-36-034-ORD-1213(R) will be withheld by your Department in making payment on the termination claim or the amount finally determined to be due the con-
[fol. 353] tractor under the price redetermination article of the contract. Your further report and recommendation concerning the disposition of the above claim for $18,810.75 are requested.

Although we have not completed our investigation of the activities of the Tuckers, our records will be made available for examination by representatives of your Department whenever so desired. The enclosures with your letter dated April 19, 1955, are returned herewith except for one complete set of the photostatic copies of the original papers which will be retained here for use in connection with such investigation.

(i) On April 3, 1956, the Chief of Army Ordnance was furnished a copy of the Comptroller General's opinion of March 16, 1956, and was directed by the Deputy Chief of Staff for Logistics (DCSLOG) to "furnish the Comptroller General * * * with a report and recommendation concerning the disposition of the above mentioned claim in the amount of $18,810.75, on or before 7 May 1956." At this point, the top echelon of the Army may have been in favor of converting the contract cancellation into a termination for convenience of the Government so that the plaintiff could file and have considered its claim for termination costs under Article 22 of the contract.

(j) In the meantime Norris, Tucker and Jack Epstein had been indicted for violation of the criminal provisions of the Anti-Kickback Act (41 U.S.C. 51, 52 and 54). At

the conclusion of the prosecution's case, on April 13, 1956, the Federal District Court Judge entertained and granted a defense motion for judgment for acquittal of the defendants on the sole legal ground that the Anti-Kickback Act was not applicable to a price redetermination contract and thus the scheme of the defendants was "despicable and morally reprehensible, but unfortunately within the narrow letter of the law." (See finding 31, *supra*, for more complete quotations.)

(k) The Ordnance Corps continued its review of the facts surrounding the Acme-Tucker relationship. On August 22, 1956, Mr. Lazure responded to the April 3, 1956 communication from DCSLOG (finding 54(i), *supra*), and sought concurrence by the latter in a proposal to refer back to the Comptroller General for reconsideration in the light of additional information the ques- [fol. 354] tion as to whether plaintiff had not breached the contingent fee covenant of the contract. The specifics of the "certain facts and additional information" presented by Mr. Lazure leads to the conclusion that it was in actuality not evidence theretofore unknown to the departments concerned, but was rather a reappraisal and argument that these known facts constituted a violation of the covenant against contingent fees. The Army Ordnance Corps through its General Counsel was unswerving in its views that cancellation of the contract was legally justified, despite some discouraging responses from other agencies of the Government which had reviewed the matter.

(l) On September 12, 1956, the Deputy Chief of Staff for Logistics instructed the Chief of Ordnance that, as had been discussed earlier at a conference on July 12, 1956, if it were ascertained what actual damage had been suffered by the Government as a result of increased contract costs due to kickbacks, and if the Department of Justice would give assurance that it could successfully defend the cancellation action, the Chief of Ordnance should prepare a letter to the Comptroller General informing him of the Army's intention to stand by the cancellation action. But if no actual damages to the Government could be shown or the Department of Justice could not give the assurance indicated, then the cancella-

tion action was to be changed into a termination for convenience, as DCSLOG had directed on April 3, 1956. The Chief of Ordnance was given until September 30 to comply.

(m) It is not in evidence whether the Department of Justice gave the Chief of Ordnance the assurances referred to in the preceding paragraph, but on February 27, 1957, DCSLOG sent a letter to the Comptroller General reciting the reasons for his conviction that plaintiff had violated the covenant against contingent fees and presenting "additional information" to this effect, although the "additional information" was much the same as that described in paragraph (k) of this finding, *supra*. The letter concludes with the following paragraph:

> After examination of the reports of the Ordnance Corps on this matter and the various internal reports of the Department of the Army, the Federal [fol. 355] Bureau of Investigation and the decision of the court in the matter concerning the three individuals, the Department of the Army believes the action instituted by those three individuals was as responsible and authorized representatives of the Acme Corporation under contracts of the United States; that such actions as corporate representatives were clearly and unequivocally in bad faith; and that there was a full intent to deceive the United States Government. The acts of these three individuals were detrimental to the interest of the United States. In view thereof, it is proposed that the cancellation of subject contract will remain in effect.

It was at this point that the Army solidified its decision to stand by the cancellation action. It felt that "the repudiation of [the contract] by the contracting officer was proper and necessary in the public interest".

(n) On May 29, 1957, the Comptroller General responded to the Army's letter of February 27, 1957, and reversed his previous views in the following words:

> On the basis of the additional information furnished in the matter, we are of the opinion that, as suggested in your letter, the relationship between

Harry K. Tucker, Jr., and the Acme Coppersmithing & Machine Company is for consideration as being within the same category as the relationship between Harry K. Tucker, Sr., and Snap-Tite, Inc., so far as there may be concerned the question as to whether there was any breach of the contingent fee covenants of the contracts awarded to those companies. Thus, it is apparent that the Acme Coppersmithing & Machine Company should be held liable for the breach of the contingent fee covenants of contracts Nos. DA-11-070-ORD-8580, 8592 and 8681.

In regard to the cancellation of contract No. DA-36-034-ORD-1213(R), your letter sets forth that, on the basis of a complete administrative review of the matter, including consideration of the decision rendered on April 13, 1956, in the case of *U.S.A.* v. *James Samuel Norris, Harry King Tucker, Jr., and Jack Harry Epstein*, Criminal No. 18536, and the internal FBI reports, it is proposed that the cancellation of the contract will remain in effect. In view of the unusual nature of this case and of the doubt which exists as to whether, under the circumstances, the contractor is entitled to have the contract terminated for convenience of the Government, we will interpose no objection to your permitting the cancellation action to stand.

[fol. 356] The "additional information" providing the stated basis of the Comptroller General's change of mind as to violation of the covenant against contingent fees was his ascertainment that Tucker was a parttime and not a fulltime employee of plaintiff at the time of plaintiff's bid submission on Contract 1213 on January 5, 1953. It is not clear whether the Comptroller General's change of view was brought about more by his reconsideration of facts previously known than by consideration of new evidence offered by the Army in the form principally of the plaintiff's letter of May 18, 1953 to POD (finding 8(f), *supra*).

(o) On July 26, 1957, the plaintiff filed the instant petition in the Court of Claims. On August 15, 1958, plaintiff submitted to POD a termination claim. Subcontractor All Metals had submitted its termination claim

on June 18, 1958, and subcontractor Manalapan had prepared certain inventory schedules in November 1954.

55. *Conclusions.* On the basis of the foregoing recital the plaintiff contends that the Army Ordnance Corps was guilty of bad faith in perversely and steadfastly refusing to capitulate to plaintiff's demands for an administrative settlement in the face of unanimous advice from the Comptroller General and the Department of Justice that there had been no violation of the statutes relied on in canceling the contract. The stubborn but permissible refusal of the Ordnance Corps, the contracting agency in the case, to follow the advice and recommendations given it from the indicated sources portrays a strength of conviction, but not bad faith. On its part the defendant complains that, through the period from cancellation to and beyond the filing of suit in July 1957, the plaintiff and its attorneys continuously sought action on the claim and had Members of Congress intercede in its behalf. Such action has no bearing on the issues now before the court.

SUBMISSION OF ALLEGEDLY FALSE CLAIMS DURING PENDENCY OF COURT PROCEEDING

56. *Acme's claim.* Just as the defendant contends that the plaintiff advanced false claims to the Government in the price redetermination proceedings as related in finding 52, *supra*, the defendant also contends that false claims [fol. 357] were advanced by plaintiff in the course of proceedings in this court, in contravention of 31 U.S.C. 231-233, and 28 U.S.C. 2514.

(a) On October 23, 1958, the commissioner directed plaintiff to furnish to the defendant under former Rule 28(b)(2) a detailed statement showing the items included in the sums sought in the petition. On November 4, 1958, plaintiff's counsel informed the commissioner that, "at the request of the Department of Justice, plaintiff has presented the fiscal aspects of its claim in the form of a termination claim pursuant to the Armed Services Procurement Regulations", and that after receipt of the audit report made by the Army Audit Agency the parties would try to settle the claim.

(b) The termination claim referred to in the preceding paragraph had been submitted by plaintiff on a form entitled "Settlement Proposal (Total Cost Basis)" under

date of August 15, 1958, under a certification reading in part as follows:

> (1) As to Contractor's Own Charges.—The proposed settlement (*exclusive of charges set forth in Item 14*) and supporting schedules and explanations have been prepared from the books of account and records of the contractor in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United States or an agency thereof; and the charges as stated are fair and reasonable.

On April 14, 1959, the Department of Justice sent to plaintiff a copy of the audit of the termination claim made by the Army Audit Agency, with the understanding that "this information is furnished you in connection with pending settlement negotiations only and, in accordance with agreement of counsel, is not to be used to prejudice any defenses which the Government has asserted or may assert in the action in the Court of Claims." In its response to plaintiff's Notice to Admit the defendant stated: "The termination claims filed by the parties mentioned were filed for the purpose of settlement negotiations and were not submitted in accordance with Rule 28(b)." Un- [fol. 358] der the circumstances it is concluded that the termination claim to which reference has been made was submitted for settlement purposes and not as a compliance with the commissioner's direction under former Rule 28. On August 27, 1959, plaintiff responded to the audit report thus furnished, summarizing the fiscal issues and objecting to certain charges and disallowances.

(c) Whether submitted as a termination claim or in compliance with the former Rule 28 requirement of the commissioner, the defendant contends that the termination claim, dated August 15, 1958, contained false claims. It is correct that the termination claim included all but $5,561.31 of those items enumerated in paragraph (b) of finding 52, *supra*, which lists certain objectionable items contained in plaintiff's price redetermination application. The $5,561.31, which plaintiff had previously asserted as

relevant costs in the price redetermination application, were eliminated as such in the termination claim because plaintiff could not provide supporting detail, and they were reclassified as General and Administrative expense, of which a portion was allocated against Contract 1213. The $5,561.31 in expenses reclassified to General and Administrative expense included expenses of entertaining visitors from Watervliet Arsenal, payments made to Watervliet Arsenal employee Harold Lee for services rendered (see finding 33, *supra*), and part of Hochstuhl's hotel bill. In addition, there was included in General and Administrative expense the $12,450 paid by plaintiff to Tucker for salaries and/or commissions, of which a portion was allocated to Contract 1213.

(d) In determining whether the plaintiff practiced fraud in the submission of its termination claim as described in the preceding paragraphs, the consequences of the fact that it may have been submitted as part of a settlement proposal instead of a formal claim are subject to dispute by the parties. At the time the termination proposal was submitted the defendant was fully aware of all of the facts giving origin to those items of the claim which the Government contends were falsely charged to the contract. The presentation of these items by the plaintiff to the Army in the form of a termination claim or settlement proposal did not deceive nor was it intended to deceive the Army, although it was an effort to obtain payment from the Army of expenses which the plaintiff [fol. 359] knew or should have known were questionable in part as to being properly chargeable against the contract. The questionable expenses in the termination proposal were not charged directly against the contract, but were charged to the plaintiff's General and Administrative expense, and in this way only a portion of the $18,011.31 of questioned expenses was allocated to the contract performance costs. Some, if not all, of the total questioned expenses would be properly included in the plaintiff's overall General and Administrative expense as costs of doing business, even though they would not be properly chargeable against the contract as a cost of its performance.

(e) On June 16, 1961, the plaintiff filed a "Statement of claims intended to be proved pursuant to Rule 28(b)

(2)". It included separate schedules of damages for plaintiff and for its subcontractors, as well as the following statements:

> Pursuant to Rule 28(b)(2) plaintiff submits herewith a schedule of damages claimed by the plaintiff and in addition thereto, a schedule of damages claimed by plaintiff's subcontractors.
>
> In the main the plaintiff's schedule is the same as was set forth in the settlement proposal which it furnished to the Department of Justice pursuant to the request of the Philadelphia Ordnance District except as modified where indicated. The modifications principally were acceptances of the Army Audit Agency's determinations.
>
> After the items in the said settlement proposal were audited, the Army Audit Agency prepared its report. A copy of the said Army Audit Report of the plaintiff's settlement proposal was furnished to the plaintiff. A copy of each of the Army Auditors Report relative to each subcontractor was not furnished to plaintiff. For comparative purposes the plaintiff lists the determinations made by the Army Audit Agency and the amounts on the individual items *which are still in issue.*
>
> * * * *
>
> SUBCONTRACTORS' CLAIMS
>
> While the subcontractors' claims have not been audited or examined by the plaintiff, it does not know or have reason to believe that there are any elements of overstatement in the said claims. Plaintiff has relied upon the audit of these claims by the Government to determine their accuracy and reasonableness.
>
> [fol. 360] For purpose of the submission under Rule 28(b)(2) all subcontractors' claims for damages are based upon the items included in the various subcontractor settlement proposals which have been submitted by each of them.
>
> * * * *
>
> If the defendant has any knowledge or reason to believe that any of the items of the claims set forth hereinabove are not accurate as to amount, or not

properly includable as an item of damage, plaintiff would welcome the opportunity of one or more pretrial conferences in which to discuss the same. This suggested procedure would narrow the issues and speed up the disposition of the subject litigation.

The plaintiff's schedule in its former Rule 28(b)(2) submission eliminated from its previous claim all of the questioned items contained in the termination settlement proposal described in paragraph (c) of this finding (relating to such items as entertainment expenses, payments to Mr. Lee of Watervliet Arsenal, certain travel expenses of Tucker, Jr. and certain expenses in connection with Norris' farm), but retained a proportionate part of the $12,450 paid to Tucker as salaries and/or commissions, and the claims of the subcontractors (under the conditions quoted above) containing in part the fees paid by the subcontractors to Tucker as related in findings 22 through 25, *supra*. The presentation of these items by plaintiff did not deceive nor was it intended to deceive the Army, which was fully aware of all of the facts giving origin to the items now claimed to have been falsely charged.

(f) By way of counterclaim under 31 U.S.C. 231-233 the defendant seeks an affirmative judgmer for $2,000 for plaintiff's misrepresentations in the price redetermination proceedings (finding 52, *supra*), plus $2,000 for misrepresentations in the termination settlement proposal (finding 56(a) through (d), *supra*), plus $2,000 for misrepresentations in connection with plaintiff's schedule submitted pursuant to former Rule 28(b)(2) as related in paragraph (e) of this finding. These counterclaims under 31 U.S.C. 231-233 are in addition to the forfeiture asked for in defendant's special plea in fraud based on violations of 28 U.S.C. 2514, but the facts constituting the alleged violations are the same in each instance.

[fol. 361] 57. *Subcontractors' claims.* Defendant has requested that findings be made that All Metals and Manalapan practiced fraud against the Government in the presentation of their instant claims by including in their statements of costs items not contributing to subcontract performance (i.e., fees to Tucker and/or Gunn Engineering Company) and thus inflating plaintiff's claimed costs.

The facts upon which the finding of fraud or lack of it must rest are contained elsewhere in these findings. See findings 18-22 *supra.*

ASSIGNMENT OF CLAIMS

58. *By Acme.*

(a) Plaintiff was closely affiliated with the National Molasses Company, shared offices in the same building, and had interlocking corporate officers and stockholders. Plaintiff had borrowed $275,000 from National Molasses Company in 1955 on a non-interest bearing basis. On February 2, 1956, the plantiff's Board of Directors authorized the execution of a mortgage on plaintiff's real property to secure $150,000 of the debt to National Molasses Company. On February 7, 1958, plaintiff's Board of Directors authorized the execution of a second mortgage on plaintiff's real property and a mortgage on its principal items of machinery and equipment to secure a further $125,000 of the debt to National Molasses Company.

(b) On February 29, 1960, at a time when the plaintiff's offer to settle its claims arising out of Contract 1213 was under consideration by the defendant, the plaintiff and All Metals entered into a letter agreement whereby any payment received by plaintiff from defendant in settlement of the contract claims was to be endorsed over to the Pittsburgh National Bank for distribution to plaintiff and All Metals in proportions stipulated in the agreement. The letter agreement was conditioned on settlement of the Contract 1213 claims with the Government by April 15, 1960. The Pittsburgh National Bank, which was the assignee under an earlier assignment from All Metals for the purpose of financing All Metals' subcontract under Contract 1213, endorsed its agreement to the letter agreement of February 29, 1960.

[fol. 362] (c) On August 8, 1960, the plaintiff executed the following "assignment" and sent it to the Pittsburgh National Bank:

> Acme Process Equipment Company (formerly Acme Coppersmithing and Machine Co.), being entitled to certain proceeds and payments from the United States Government by reason of its contract

No. 1213-R, and whereas the said Acme Process Equipment Company has heretofore, by letter agreement dated March 4, 1960, authorized the Pittsburgh National Bank (formerly Peoples First National Bank and Trust Company), assignee of All Metals Industries, Inc., to receive and disburse the moneys as therein provided, and it now being the intention of Acme Process Equipment Company to secure National Mollasses Company, a corporation with principal place of business at Oreland Mill Road, Oreland, Pa., to which it is indebted, now therefore, subject to the letter agreement aforesaid referred to, Acme Process Equipment does hereby assign, set over and transfer to it, the said National Molasses Company, whatever proceeds it, the said Acme Process Equipment Company shall be entitled to as aforesaid, up to but not in excess of the sum of $275,000, and this assignment and transfer of the proceeds as aforesaid up to $275,000, shall stand binding and unrevoked unless and until the Pittsburgh National Bank shall receive appropriate written authority to the contrary from both Acme Process Equipment Company and National Molasses Company.

The letter agreement of March 4, 1960, to which the foregoing assignment of August 8, 1960 refers, is the letter agreement dated February 29, 1960, described in the preceding paragraph (b). From the circumstances under which it was made, including the references in the document itself, the terms of the resolution of plaintiff's Board of Directors which authorized the execution of the assignment, and the fact that plaintiff had already executed another assignment of contract proceeds to the Girard Trust Corn Exchange Bank for the purpose of financing Contract 1213, it is reasonable to conclude that the assignment to National Molasses Company was not an assignment of its claim against the Government (as defendant contends), but (as plaintiff contends) merely a direction to a neutral bank to distribute a share of the proceeds of an anticipated settlement to the National [fol. 363] Molasses Company when and if the settlement materialized, which was at the time by no means certain

and as a matter of fact did not materialize.[12] Thus the assignment was dependent on a contingency which did not occur. A test would be whether, in the event a judgment were ultimately awarded to plaintiff in the instant litigation, the so-called assignment to the National Molasses Company would be enforceable. The National Molasses Company has asserted no interest in the instant litigation.

(d) On November 9, 1960, the plaintiff and All Metals entered into a revised letter agreement in the form of a joint direction to Pittsburgh National Bank, which rescinded the earlier letter agreement dated February 29, 1960 and substituted other directions as to the distribution of any settlement proceeds received from the Government as a result of a revised settlement offer in a smaller amount made by plaintiff to the Government. This offer was not accepted by the Government.

59. *By All Metals.* On March 11, 1953, All Metals assigned the proceeds of its subcontract with plaintiff to the Peoples First National Bank & Trust Company and notified plaintiff. This banking institution changed its name to the Pittsburgh National Bank in the course of a merger, and is now the owner of the assignment. The plaintiff waived its right to make payment to other than the assignee and its right of setoff for any claims which it might have except for claims arising under the subcontract. On April 3, 1954, the plaintiff advised All Metals in part as follows:

> 9. You further agree that as against Peoples First National Bank & Trust Company, of Pittsburgh, Pa., to whom we have assigned our accounts receivable, including all sums due or to become due under the above mentioned purchase order, as collateral security for loans made or to be made to us by the said bank, and as an inducement to the said Peoples First National Bank & Trust Company to make a further loan or loans to us, you will not assert any defenses, set-offs, counterclaims or recoupments, of any nature or kind, arising from your dealings with us, excepting only such set-off as shall represent the rental of equipment to us for the performance of the above mentioned purchase order, which shall only be as-

[12] The defendant has taken no exception to this finding.

[fol. 364] serted against the amounts payable for the last deliveries under the said purchase order, and which shall not exceed $8,421.26.

The defendant has not formally pleaded as a defense that All Metals assigned its claim in violation of law and considers the issue to be irrelevant. However, the pertinent facts have been included at the plaintiff's request.

DAMAGES

60. *Acme's costs and credits.* The following schedule lists the items and amounts which Acme claims it incurred in contract performance, the amounts thereof verified by defendant as properly chargeable to contract performance, the amounts in issue, the credits against the costs, and post-cancellation expenses.

Item	Claimed by plaintiff	Verified and/or claimed by defendant	In issue
Costs			
Direct material	$440,796	$440,796	None
Direct labor:			
Overtime	11,186	None	$11,186
Straight	206,834	206,834	None
Indirect factory expense on:			
Overtime labor @ 119.89%	13,411	None	13,411
Straight labor	224,110	224,110	None
Dies, jigs, fixtures, special tools	82,264	37,359	44,905
Other costs	62,359	52,632	9,727
Total costs before G & A	1,040,960	961,731	79,229
G & A (6.25%)	95,984	51,302	44,682
Total costs	1,136,944	1,013,033	123,911
Credits			
Partial payments to plaintiff	389,310	389,310	None
Disposal credits	621	621	None
Undelivered tools	None	6,206	6,206
Scrap	None	1,118	1,118
Duplicate payment	None	674	674
Defective rifles	None	5,668	5,668
Unreturned vent assemblies	None	4,760	4,760
Liquidated damages	None	56,316	56,316
Total credits	389,931	520,989	131,058
Total costs less total credits (loss)	747,013	592,044	----------
Post-Cancellation Costs			
Rental of Lansdale plant	29,144	None	29,144
Insurance	750	None	750
Interest on V-loan	16,506	None	16,506
Legal fees	15,152	None	15,152
Maintenance	5,400	None	5,400
Total post-cancellation costs	66,952	None	----------

[fol. 365] Acme admits the defendant's entitlement to the following amounts by way of counterclaim: $6,206 for undelivered tools (finding 53), $675 for a duplicate payment; $2,519 for defective rifles; $4,760 for unreturned vent assemblies; and $1,739 as a disposal and scrap credit (see, in part, finding 53(e)). The total amount of this counterclaim is $15,898.

61. *All Metals' costs and credits.* The following schedule lists the items and amounts which All Metals claims it incurred in subcontract performance, the amounts thereof verified as applicable by defendant as properly chargeable to subcontract performance, the amounts in issue, the credits against the costs, post-cancellation expenses, unreimbursed costs of third-tier subcontractors, and total amounts due All Metals.

Item	Claimed by All Metals	Verified and/or claimed by defendant	In issue
Costs			
Direct material	$89,920	$79,830	$10,090
Direct labor	111,774	107,879	3,895
Indirect factory expense	58,264	49,236	9,028
Dies, jigs, fixtures, tools	80,063	43,710	36,353
Total costs before G & A	340,021	280,655	
G & A (31.37%)	38,115	33,287	4,828
Total costs	378,136	313,942	64,194
Credits			
Payments by Acme	201,827	201,827	None
Disposal credits	430	430	None
Total credits	202,257	202,257	None
Net due under subcontract			
Costs less credits			
Profit or loss on completion			
Net due under subcontract			
Post-cancellation costs			
Accounting fees	3,070	None	3,070
Management salaries	6,000	None	6,000
Telephone	1,000	None	1,000
Travel	2,000	None	2,000
Office rent	345	None	345
Storage	702	None	702
Insurance	755	None	755
Plant labor	2,000	None	2,000
Interest	60,488	None	60,488
Total post-cancellation costs	76,360	None	76,360
Third-tier subcontracts			
Canton	10,434	10,434	None
Edgewater	3,713	3,713	None
Total due All Metals	14,147	14,147	None

[fol. 366] 62. *Claims of other subcontractors: Fiscal aspects.* Subsequent to the cancellation of Contract 1213 certain of Acme's subcontractors filed claims against Acme to recover sums relating to their subcontracts which Acme had, in turn, canceled. Other than All Metals, whose claim has already been described, these other subcontractors, the claims they present here, and the extent of verification of their claims, are shown in the following schedule:

Subcontractor	Amount claimed	Verified by defendant	In issue
Steel Heddle	$1,814	$1,814	None
Intricate	2,006	2,006	None
Pattern	2,616	2,616	None
Foley	3,726	3,476	250
Nicholson	1,886	296	1,590
Manalapan	36,999	21,629	15,370
Totals	49,047	31,837	17,210

Although defendant verified these claims to the extent indicated, plaintiff did not prove at the trial the claims of Steel Heddle, Intricate, Pattern, and Nicholson.

63. *Manalapan's claim.* The deletion of $15,370 from the claim by Manalapan consists of $4,120 for various items which Manalapan waived, and a storage claim of $11,250. Manalapan claims to have stored a quantity of tooling owned by the Government after contract cancellation and to have maintained it in storage. The evidence fails to establish that the Government owned the tooling which Manalapan claims to have stored. During the post-cancellation period the Government made diligent efforts to get plaintiff to return Government-owned tooling thought to be in the possession of Manalapan, but Manalapan at that time denied that it had possession of the tooling. It cannot now claim storage charges for the storage of Government-owned tooling of which it previously denied possession.

64. *Right to relief.* The defendant contends that, under the terms of their subcontracts with Acme, none of the subcontractors had recourse against Acme and, accordingly, no actions can be maintained in their behalf against the Government. The specific language of the subcontracts

upon which the defendant bases this contention is shown below.

[fol. 367] (a) *Nicholson, Steel Heddle, Intricate, Pattern, and Foley subcontracts.* In each of the subcontracts mentioned, and in all of the several purchase orders issued to Manalapan, the following language appears:

> 3. We reserve the right to cancel entirely or to reduce the quantity of material covered by this order.

(b) *Manalapan.* In two of the purchase orders issued to Manalapan by Acme the following conditions appear in addition to that quoted above:

> 3. INVOICES. * * * Each invoice (including copies) must be certified as follows: "I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with. This order and the work done or articles furnished hereunder shall be subject in all respects to the prime contract and to any statute, law, rule, regulation or administrative action relating to the foregoing." The liability of the buyer for payment of any articles delivered by the seller shall be contingent upon the buyer being reimbursed thereof by the government under the price contract. * * *
>
> * * * * *
>
> 12. CANCELLATION: (a) Buyer reserves the right to cancel this order or any part thereof (without any liability to Seller except for the purchase price of articles previously delivered to and accepted by Buyer and the Government) if delivery is not made within the time specified or within a reasonable time in case no time is specified, or if the quantity or quality of the articles ordered is not as specified herein, except in those cases in which such delay or default is due causes beyond Seller's control and without Seller's fault or negligence, including, but not restricted to acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restric-

tions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes. (b) Buyer also reserves the right at any time whenever the prime contract is cancelled to cancel this order, or any part thereof, by written notice to Seller, even though Seller is not in default hereunder, and this order is subject to all the terms and conditions of the usual standard form of provisions of clauses providing for the termination of supply con-
[fol. 368] tracts for the convenience of the Government, and to all the terms and conditions of any prime contract to which this order relates. Thereupon Seller shall, unless the notice otherwise specifies, discontinue all work and the placing of orders hereunder and shall cancel all existing orders and subcontracts. Upon such cancellation settlement of any amounts due the Seller shall be in accordance with such equitable settlement of any approved and allowed by the Government as being reimbursable to the Buyer under the prime contract. Buyer shall be under no liability for the payment of such settlement until it receives from the Government approval and allowance of Seller's claim in respect of such settlement. Either before or after cancellation all rights of the Buyer herein may be assigned to the Government and thereupon all liability of the Buyer and Seller shall terminate except as to articles previously delivered to and received and accepted by the Buyer and the Government, and then only to the extent the Buyer has been reimbursed by the Government for the purchase price thereof.

It is not known to what extent the two purchase orders in question are represented in Manalapan's claim.

(c) *All Metals.* The provisions quoted above in paragraph (b) in the two Manalapan purchase orders were also contained in the purchase order issued to All Metals, except that, by amendment requested by All Metals, the following proviso was added at the end of Conditions 3 and 12, entitled "Invoices" and "Cancellation", respectively:

* * * provided, however, that in any event, where the buyer is not reimbursed by the government by reason of any matter, cause or thing not within the seller's control, the buyer shall remain liable to the seller for the articles delivered.

(Note: The same provisions were contained in the purchase order issued by Acme to All Metals under Contract 8580, and are reprinted in finding 19 in *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538-59, decided this day on pages 11-13 of the opinion accompanying that report the legal effect of the provisions on the right of Acme to prosecute a claim on behalf of All Metals is discussed.)

(d) All Metals assigned the proceeds of its subcontract to a bank to secure a loan of money for the performance of the subcontract. Acme accepted the Notice of Assignment from the bank and waived "its right of set-off for [fol. 369] any claims which it might have or might hereafter have except for claims arising under the contract and/or Purchase Order referred to herein." Following the termination for convenience of the Government of plaintiff's Contract 8580, All Metals' bank was unwilling to continue to finance All Metals for the performance of the contract in suit unless it received certain assurances from Acme. These assurances were forthcoming in the form of an agreement between Acme and All Metals, contained in a letter of April 3, 1954, from All Metals to Acme, which read in part as follows:

> 9. You further agree that as against Peoples First National Bank & Trust Company, of Pittsburgh, Pa., to whom we have assigned our accounts receivable, including all sums due or to become due under the above mentioned purchase order, as collateral security for loans made or to be made to us by the said bank, and as an inducement to the said Peoples First National Bank & Trust Company to make a further loan or loans to us, you will not assert any defenses, set-offs, counterclaims or recoupments, of any nature or kind, arising from your dealings with us, excepting only such set-offs as shall represent the rental of

equipment to us for the performance of the above mentioned purchase order, which shall only be asserted against the amounts payable for the last deliveries under the said purchase order, and which shall not exceed $8,421.26.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover in accordance with the foregoing opinion. The court also concludes that the defendant is entitled to recover seventeen thousand eight hundred ninety-eight dollars ($17,898), on its counterclaims. The amount of plaintiff's ultimate recovery will be determined, pursuant to the opinion, under Rule 47(c).

[fol. 370]

PROCEEDINGS AFTER COURT DECISION:

On August 25, 1965, defendant filed a motion for reconsideration.

On October 15, 1965, the court entered an order denying defendant's motion for reconsideration.

[fol. 371]

[Clerk's Certificate omitted in printing]

[fol. 372]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

UNITED STATES, PETITIONER

vs.

ACME PROCESS EQUIPMENT CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 12th, 1966.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 12th day of January, 1966.

[fol. 373]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

UNITED STATES, PETITIONER

vs.

ACME PROCESS EQUIPMENT CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including March 14, 1966.

/s/ William S. Brennan, Jr.
Assssociate Justice of the Supreme Court of the United States

Dated this 9th day of February, 1966.

[fol. 374]

SUPREME COURT OF THE UNITED STATES

No. 1116, October Term, 1965

UNITED STATES, PETITIONER

v.

ACME PROCESS EQUIPMENT COMPANY

ORDER ALLOWING CERTIORARI.—April 25, 1966

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 375]

PLAINTIFF'S EXHIBIT NO. 1—NEGOTIATED CONTRACT DA-36-034-ORD-1213 DATED JANUARY 27, 1953

jb Page 1

DEPARTMENT OF ...	DEPARTMENT OF THE	CONTRACT NO.
NEGOTIATED CONTRACT	Army	DA-36-034-ORD-1213 (R)

ISSUING OFFICE

NAME	ADDRESS
Philadelphia Ordnance District	1500 Chestnut Street Philadelphia 2, Pennsylvania

CONTRACTOR

NAME	ADDRESS
Acme Coppersmithing & Machine Co.	Oreland, Pennsylvania

RECEIVED
MAY 27 1968
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CONTRACT FOR	AMOUNT
75 MM Recoilless Rifles M20 and Accessories	$ 873,936.06 (Target)

APPROPRIATION AND OTHER ADMINISTRATIVE DATA

ALLOTMENT: The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotment, the available balance of which is sufficient to cover payment for same:

5-3025 P100-09 A2134990.005 S36-034 (01113) ($783,048.06)
5-3025 P100-08 A2134990.005 S36-034 (01113) ($ 90,888.00)

SUB-PRODUCTION ORDER NO: C-104-53-830-144-121

PAYMENT: To be made by the Finance Officer, U. S. Army
2800 South 20th Street, Philadelphia 45, Pennsylvania

CLASSIFICATION: This contract is unclassified.

Applicable Priority Rating DO-A5
Certified under NPA Regulation No. 2

/s/ W. N. TISDALE
W. N. TISDALE
Col, Ord Corps
Deputy District Chief
Chief Contracting Officer

This negotiated contract is entered into pursuant to the provisions of Section 2 (c) (1) of the Armed Services Procurement Act of 1947 *(Public Law 413, 80th Congress)*, and any required determination and findings have been made. and Presidential Proclamation 2914

THIS CONTRACT is entered into as of 27 JANUARY, 19 53, by and between the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and ACME COPPERSMITHING & MACHINE CO.
(NAME OF CONTRACTOR)

(I) a corporation organized and existing under the laws of the State of PENNSYLVANIA

(II) a partnership consisting of

(III) an individual trading as

hereinafter called the Contractor. The parties hereto agree that the Contractor shall fur the supplies and perform all the services set forth in the attached Schedule, for the cons

DD FORM 351

BLANK

PAGE

[fol. 376]

SCHEDULE Contract No. DA-36-034-ORD-1213 | PAGE NO. 2 | NO. OF PAGES 6

ARTICLE A1. Scope of Contract

1. The Contractor, as an independent Contractor and not as an agent of the Government, shall furnish and deliver to the Government the following items:

Item	Description	Quantity	Unit Price	Total Target	Ceiling
1	Finish Machine and Assemble 75MM Recoilless Rifle M20 in accordance with Drawing and Specifications of Exhibit "A", consisting of pages 1 thru 5, attached hereto and made a part hereof. Charpy Test Requirements must be met.	2,322	$337.23 ea.	$783,048.06	115% of Target Price
2	Accessories, Tools and Equipment for Item 1 in accordance with Drawings and Specifications of Exhibit "A". Each set shall consist of the following:	24 sets	$3,787.00/set	90,888.00	110% of Target Price

Dwg. No.	Description	Qty per 1 set	Qty 24 sets	Unit Cost per Set	Unit Cost per Item
B168038	Brush, Bore, M9	100	2,400	$319.00	$19,656.00
B7230135	Brush, Contour	100	2,400	117.00	2,808.00
C83755	Cover, Bore Brush, M616	100	2,400	98.00	2,352.00
D7229951	Cover, Breech, T2058	100	2,400	517.00	12,408.00
D7229952	Cover, Muzzle, T315	100	2,400	104.00	2,496.00
C91875	Ramser, Clean & Unloading M3	100	2,400	339.00	8,136.00
B104031	Staff, End	100	2,400	315.00	7,560.00
B104029	Staff, Middle	100	2,400	410.00	9,840.00
A7229921	Wrench, Set or Cap Screw, etc.	100	2,400	42.00	1,008.00
A7229922	Wrench, Set or Cap Screw, etc.	100	2,400	57.00	1,368.00
B7230851	Wrench, Fuse, M16	100	2,400	791.00	18,984.00
C7231161	Wrench, Fuse, M18	100	2,400	178.00	4,272.00

for the total consideration of Eight Hundred Seventy-three Thousand, Nine Hundred Thirty-six Dollars and Six Cents ($873,936.06), subject to the Price Redetermination Clause (Form II-B).

• • • •

DD [illegible] 1-1

BLANK

PAGE

[fol. 377] 10. LIQUIDATED DAMAGES: ½ of 1% of the contract price of undelivered units for each day's delay after the date or dates specified for deliveries hereunder.

The following paragraphs shall be added to General Provision No. 11, DEFAULT, of Standard Form 32, and Paragraph (f) contained therein is hereby deleted:

> (f) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and therefore in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay the amount set forth elsewhere in this contract; provided that the Government may terminate this contract in whole or in part as provided in paragraph (a) of this clause, and in that event the Contractor shall be liable, in addition to the excess costs provided in paragraph (c) above, for liquidated damages accruing until such time as the Government may reasonably provide for the procurement of similar supplies or services. The Contractor shall not be charged with liquidated damages when the delay arises out of causes beyond the control and without the fault or negligence of the Contractor, as defined in paragraph (b) above, and in such event, subject to the clause of this contract entitled "Disputes," the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance when in his judgment the findings of fact justify an extension.
>
> (g) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

[fol. 378]

GENERAL PROVISIONS

(SUPPLY CONTRACT)

[fol. 379]

11. DEFAULT

(*a*) The Government may, subject to the provisions of paragraph (*b*) below, by written Notice of Default to the [fol. 380] Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(*b*) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(*c*) In the event the Government terminates this contract in whole or in part as provided in paragraph (*a*) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may

deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services, *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(*d*) If this contract is terminated as provided in paragraph (*a*) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price for completed supplies delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(*e*) If, after notice of termination of this contract under the provisions of paragraph (*a*) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (*b*) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (*Except as otherwise provided in this contract,*

this paragraph (e) applies only if this contract is with a military department.)

(*f*) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

[fol. 381]

22. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (ASPR 8-701)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall (1) stop work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated; (5) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause; (6) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings, information, and

other property which, if the contract had been completed, would have been required to be furnished to the Government; (7) use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in provision (6) of this paragraph, provided, however, that the Contractor (i) shall not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest. At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulation, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same, provided that the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form and with the certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than two years from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such two-year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such two-year period or any extension thereof. Upon failure of the Contractor to submit its termination claim within the [fol. 382] time allowed, the Contracting Officer may determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall determine, on the basis of information available to him, the amount, if any,

due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) For completed supplies accepted by the Government (or sold or acquired as provided in paragraph (b) (7) above) and not therefore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(2) The total of—

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e) (1) hereof;

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b) (5) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the costs payable under (i) above).

(iii) A sum equal to 2% of that part of the amount determined under (i) which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8% of the remainder of such amount, but the aggregate of such sums shall not exceed 6% of the whole of the amount determined under subdivision (i) above, which amount for the purpose of this subdivision (iii) shall exclude any charges for interest on borrowings.

(3) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reason-

ably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract. The total sum to be paid to the Contractor under (1) and (2) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall otherwise expressly assume the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in paragraph (e) (1) and paragraph (e) (2) (i), the fair value, as determined by the Contracting Officer, in connection with property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b) (7).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the Statement of Principles for Consideration of Costs set forth in Part 4 of Section VIII of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes", from any determination made by the Contracting Officer under paragraphs (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii)

if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (1) all unliquidated advance or other unliquidated payments on account theretofore made to the Contractor, (2) any claim which the Government may have against the Contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs [fol. 383] incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition.

(k) Unless otherwise provided for in this contract, or by applicable statute the Contractor, from the effective date of termination and for a period of six years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

* * * *

[fol. 384]

PRICE REDETERMINATION (FORM II-B).

(a) The prices stated herein may be increased or decreased in accordance with this clause. In no event shall the revised price exceed 115% of the Unit Price, as amended, of item 1 plus 110% of the Unit Price, as amended, of item 2.

(b) *Times for negotiation.*

(1) Upon completion of delivery of 30% percent of item 1 to be furnished under this contract or upon expenditure of ..... percent of the total contract *target* amount, whichever shall occur last, the parties shall negotiate to revise the prices of all items theretofore and thereafter to be delivered. Within 30 days after the completion of delivery or expenditure of funds referred to above, the Contractor shall furnish to the Contracting Officer the statements and data referred to in paragraph (c) of this clause. At any time and from time to time after the completion of delivery or expenditure of funds referred to above, subject to the limitations specified in this clause, either the Government or the Contractor may deliver to the other a written demand that the parties negotiate to adjust the prices under this contract. No demand shall be made prior to 90 days after completion of delivery or expenditure of funds referred to above, and thereafter neither party shall make a demand having

an effective date within 90 days of the effective date of any prior demand. Each demand shall specify a date (identical with or subsequent to the date of the delivery of the demand) as of which the revised prices shall be effective as to the deliveries made thereon and thereafter. This date is hereinafter referred to as "the effective date of the price redetermination". For the purposes of the first negotiation contemplated by this paragraph, the date of execution of this contract shall be deemed to be the effective date of the price redetermination. Any demand under this clause, if made by the Contractor, shall state briefly the ground or grounds therefor and shall be accompanied by the statements and data referred to in paragraph (c) of this clause. If the demand is made by the Government, such statements and data will be furnished by the Contractor within 30 days of the delivery of the demand.

(2) In the event all remaining work under this contract, as it may from time to time be amended, shall be terminated pursuant to the clause of this contract entitled "Termination for Convenience of the Government", no demand shall then or thereafter be made and any demand the effective date of which is less than 30 days before the effective date of such termination shall be void and of no effect.

(c) *Submission of data.*—At the time or each of the times specified or provided for in paragraph (b) of this [fol. 385] clause the Contractor shall submit (i) a new estimate and breakdown of the unit cost and the proposed prices of the items remaining under this contract after the effective date of the price redetermination, itemized so far as is practicable in the manner prescribed by WD Form 105; (ii) an explanation of the differences between the original (or last preceding) estimate and the new estimate; (iii) such relevant shop and engineering data, cost records, overhead absorption reports and accounting statements as may be of assistance in determining the accuracy and reliability of the new estimate; (iv) a statement of experienced costs of production hereunder to the extent that they are available at the time or times of the negotiation of the revision of prices hereunder; and (v) any other relevant data usually furnished in the

case of negotiation of prices under a new contract. The Government may make such examination of the Contractor's accounts, records and books as the Contracting Officer may require and may make such audit thereof as the Contracting Officer may deem necessary.

(d) *Negotiations.*

(1) Upon the filing of the statements and data required by paragraph (c) of this clause, the Contractor and the Contracting Officer will negotiate promptly in good faith to agree upon prices for items to be delivered on and after the effective date of the price redetermination. Negotiations for price redetermination under this clause shall be conducted on the same basis, employing the same types of data (including, without limitation, comparative prices, comparative costs, and trends thereof) as in the negotiation of prices under a new contract.

(2) After each negotiation the agreement reached will be evidenced by a supplemental agreement stating the redetermined prices to be effective with respect to deliveries on and after the effective date of the price redetermination (or such other later date as the parties may fix in such supplemental agreement).

(e) *Disagreements.*—If within 30 days after the date on which the statements and data are required pursuant to paragraph (b) of this clause to be filed (or such further period as may be fixed by written agreement) the Contracting Officer and the Contractor fail to agree to redetermined prices (which term, for the purpose of this clause, shall include direct costs, indirect costs and profit), the failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes", and the prices so fixed shall remain in effect for the balance of the contract notwithstanding any other provision of this clause.

(f) *Payments.*—Until new prices shall become effective in accordance with this clause, the prices in force at the effective date of the price redetermination shall be paid upon all deliveries, subject to appropriate later redetermination made pursuant to paragraph (d) or (e) or (g) (2) (B) of this clause. It is mutually understood that [fol. 386] where the Contractor fails to submit cost data

required by paragraph (b) (1) of this clause within the time specified, payment of all invoices shall be suspended by the Contracting Officer until such time as the required statements and data are furnished by the Contractor.

(g) *Termination provisions.*—For any of the purposes of the clause of this contract entitled "Termination for Convenience of the Government" (including without limitation, the computation of "the total contract price" and "the contract price of work not terminated"), the contract price of delivered articles shall be deemed to be,

(1) For all items delivered prior to the effective date of the price redetermination, the contract price (giving effect to any prior revisions under this clause) applicable to each such item.

(2) For all items delivered on or after the effective date of the price redetermination.

(A) The contract price as revised in accordance with this clause if such revision shall have been agreed upon.

(B) If such revision shall not have been agreed upon, then such estimated prices as the Contractor and the Contracting Officer may agree upon as reasonable under all the circumstances and in the absence of such agreement such reasonable prices as may be determined in accordance with the clause of this contract entitled "Disputes".

(h) *Termination during the initial period.*—In the event that this contract is terminated pursuant to the clause of this contract entitled "Termination for Convenience of the Government", or the Contractor's right to deliver is terminated pursuant to the clause of this contract entitled "Default", so that the last delivery under the contract as terminated is made prior to the completion of the initial period as specified in paragraph (b) of this clause, the Contractor within 30 days after such last delivery shall furnish the data required by paragraph (c) of this clause and thereupon the parties shall negotiate in good faith to agree upon revised prices under this contract. The agreement reached shall be evidenced by a supplemental agreement to this contract stating the revised prices under the contract. Any disagreement as

to the revised prices will be disposed of as a question of fact in accordance with the clause of this contract entitled "Disputes".

[fol. 387]

Contract No. DA-36-034-ORD-1213 (R)

38. *Approval of Subcontracts.*

1. The Contractor shall not place any subcontract or purchase order except a purchase order for materials without the prior written approval of the Contracting Officer which (i) is on a cost or cost-plus-a-fixed-fee basis or (ii) is on a fixed price basis exceeding in dollar amount $25,000.00 or (iii) is on a time and material or labor hour basis. The Contracting Officer may, in his discretion, ratify in writing, any such subcontract; such action shall constitute the approval of the Contracting Officer as required by this paragraph.

2. The Contractor agrees that no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

3. The consent of the Contracting Officer obtained as required by this clause shall in no way relieve the Contractor of any of its obligations assumed under this contract, nor shall it be construed to constitute a determination of the allowability of any cost under this contract which would not be allowable if such consent were not required.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 219362 851

BLANK

PAGE

BLANK

PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes Involved	2
Statement	3
1. The contract	4
2. Proceedings below	9
Reasons for granting the writ	12
Conclusion	21
Appendix	I–144

CITATIONS

Cases:

L. Albert & Son v. *Armstrong Rubber Co.*, 178 F. 2d 182	16
Gleason v. *Seaboard Ry.*, 278 U.S. 349	19
Muschany v. *United States*, 324 U.S. 49	20
Paul v. *United States*, 371 U.S. 245	14
Standard Surety & Cas. Co. v. *Plantsville Nat. Bank*, 158 F. 2d 422	19
United States v. *Barnard*, 255 F. 2d 583, certiorari denied, 358 U.S. 919	7, 20
United States v. *Caltex, Inc.*, 344 U.S. 149	2
United States v. *Central Eureka Mining Co.*, 357 U.S. 155	2
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520	9, 10, 12, 17, 18
United States v. *Penn Foundary*, 337 U.S. 198	16

210-151—66——1

Statutes:

	Page
The Anti-Kickback Act, 60 Stat. 37, 74 Stat. 740, 41 U.S.C. 51	3, 6, 7, 10, 12, 17, 18, 19, 20
False Claims Act, 31 U.S.C. 231	8, 10
The Tucker Act, 62 Stat. 940, as amended, 28 U.S.C. 1491	2
10 U.S.C. 2306(b)	8
10 U.S.C. 2306(c)	14
Miscellaneous:	
H. Rep. 212, 79th Cong., 1st Sess	19
H. Rep. 1880, 86th Cong., 2d Sess	7
Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 Ohio State L. J. 264 (1959)	16
S. Rep. 1585, 86th Cong., 2d Sess	7, 20
32 C.F.R. 1.301 (1954)	14
32 C.F.R. 3.401 (1954)	14
32 C.F.R. 3.402(b) (1965)	14
32 C.F.R. 3.405 (1965)	14
32 C.F.R. 3.405, 3.405.1, 3.406, 3.406.1 (1954)	14
32 C.F.R. 3-801.1 (1965)	14
32 C.F.R. 7.102-21, 8.701(e) (1954)	14
32 C.F.R. 7.103-11 (1954)	14
32 C.F.R. 7.103-11, 8.707 (1965)	14
32 C.F.R. 7.103-21, 8.701 (e) (1965)	14

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ACME PROCESS EQUIPMENT COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims entered in this case on June 11, 1965.

OPINIONS BELOW

The opinion of the Court of Claims (App., *infra*, pp. 1–42) is reported at 347 F. 2d 509. The findings of the Court of Claims (App., *infra*, pp. 42–144) are unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on June 11, 1965. A timely motion for reconsideration was denied on October 15, 1965. By orders of the Chief Justice and Mr. Justice Brennan, entered

on January 12, 1966, and February 9, 1966, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).[1]

QUESTIONS PRESENTED

1. Whether, when the government is found to be in breach of contract, the contractor may obtain "restitutional" recovery of all the reasonable expenses he has incurred under the contract, even though (since the contract was not a profitable one for the contractor) this places him in a better position than he would have been in if the contract had not been terminated by the government.

2. Whether the discovery of violations of the Anti-Kickback Act between subcontractors and officials of a prime government contractor is a ground for terminating the prime contract.

STATUTES INVOLVED

The Tucker Act, 62 Stat. 940, as amended, 28 U.S.C. 1491, provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

[1] Although the decision of the Court of Claims is interlocutory in the sense that it does not finally grant or deny relief, this Court has jurisdiction under 28 U.S.C. 1255(1). *United States* v. *Caltex, Inc.*, 344 U.S. 149; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Anti-Kickback Act, 60 Stat. 37, as amended, 41 U.S.C. 51, provides, in relevant part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, * * * (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; * * * as an inducement for the award of a subcontract or order from the prime contractor * * * is prohibited. The amount of any such fee, commission, or compensation or the cost of expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor * * *. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor * * * in connection

with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor.[2]

STATEMENT

1. *The Contract.* On January 27, 1953, the Army Ordnance Corps awarded respondent, Acme Process Equipment Co., a contract for the manufacture of .75mm recoilless rifles (F. 13; App. p. 50).[3] Prior to

[2] Prior to its amendment in 1960 (74 Stat. 740), this Act applied only to contracts "on a cost-plus-a-fixed fee or other cost reimbursable basis." 60 Stat. 37.

[3] "F" refers to the Findings of the Court of Claims, App., *infra*, pp. 42–144.

The contract price was $337.23 per rifle, subject to revision, with a ceiling of $384.95 per rifle. Competing bids had been obtained, including bids of $423 and $484.05 per rifle. The government contracting officials were concerned over Acme's ability to produce the rifle at the price quoted in its bid, especially in view of the fact that it did not have previous experience in the field. Accordingly, Acme was offered the opportunity to withdraw its bid. Acme refused this opportunity. Accordingly, the higher competing bids were rejected, and the contract awarded to Acme, after the Army determined that, although Acme's bid was low, it was reasonable and attainable in light of all the factors then known. (F. 7, 9, 10; App. pp. 45, 48–49).

that time—in October, 1952, before the prime contract was negotiated—Acme had hired Harry Tucker, Jr., and his associate, James Norris, for the purpose of establishing and managing a new division of the company to handle government contracts. Norris was made general manager of production, with authority to submit bids, sign government contracts, and award subcontracts; Tucker was placed in charge of sales, government contracts, and expediting subcontract operations (F. 3, 16; App. pp. 43, 55).

Before the execution of the prime contract, Tucker entered into contracts with three companies providing that Tucker was to receive commissions (which he shared with Norris) on subsequent sales by these companies to Acme. After entering into this "kickback" arrangement, one of these companies participated in negotiation conferences between Acme and the Army which led to the award of the prime contract (F. 19; App. p. 56), and, within a few weeks after the award of the prime contract, each of these three companies was awarded subcontracts by Acme. (F. 18, 19, 22, 23; App. pp. 56–58, 61–63). A fourth company obtained subcontracts from Acme after having agreed to pay commissions to Tucker's father, and a fifth company obtained an Acme subcontract upon the recommendation of Philip Chagnon, who was on Acme's payroll as Norris's assistant. This company had a kickback agreement with Chagnon (F. 24, 25; App. pp. 63–64).

Within a month after the award of the prime contract, Jack Epstein, who was the superintendent of an Acme plant and the son of Acme's president and principal stockholder, entered the kickback conspiracy. Epstein threatened cancellation of a principal subcontract unless the subcontractor paid him $25,000. It was thereafter arranged that $23,500 would be paid to a dummy corporation owned by Tucker, Norris and Epstein for fictitious consulting services; this amount was charged to Acme through an increase in the subcontract price (F. 1, 20, 21; App. pp. 42, 58–61).

Other officials of Acme were not on actual notice of the kickback activities of Epstein, Tucker, Norris and Chagnon until the late summer and fall of 1953 (F. 30; App. p. 65). Tucker's employment contract with Acme, however, specifically stated that he represented and would continue to represent firms in other lines of business; Acme did not consult with these other clients at the time Tucker was hired (F. 3, 5; App. pp. 43, 44). Moreover, during the negotiation of the prime contract, Army officials advised Acme that Tucker's father was suspected of "five-percenter" activities. Joshua Epstein, Acme's president, instituted no further investigation at that time (F. 8(d), 30; App. pp. 47, 65). When Joshua Epstein ultimately came to suspect improper activities, he caused the resignation of the employees involved (F. 26–30; App. pp. 64–65).

Tucker, Norris and Jack Epstein were subsequently indicted for violation of the Anti-Kickback Act, 60 Stat. 37 (F. 31; App. p. 31). After presentation of the government's case, the defendants' mo-

tion for acquittal was granted on the ground that the Act—which at that time covered only "cost-reimbursable" government contracts[4]—did not apply to the contract here involved, which was a fixed-price contract with a provision for price redetermination subject to a ceiling price.[5] The district court characterized the defendants' conduct as "despicable and morally reprehensible, but unfortunately within the narrow letter of the law" (F. 54(j); App. p. 128). Amendatory legislation was recommended by the Comptroller General (H. Rep. 1880, S. Rep. 1585, 86th Cong. 2d Sess.) and the Act was amended retroactively in 1960 to apply to all negotiated contracts, including contracts such as the one in this case (74 Stat. 740; 41 U.S.C. 51).

From January, 1953, onward, Acme engaged in work on the contract. The contract did not prove profitable for Acme; its cost of production proved to be more than double the maximum price specified by the contract (F. 52; App. pp. 116–118). Although delivery schedules were extended, Acme fell behind those schedules, and liquidated damages were assessed under the liquidated damages clause of the contract (F. 14, 46; App. pp. 51, 109–111). By the end of July, 1954, 1,163 rifles had been delivered (F. 14; App. p. 51). On July, 1954, shortly after the Army

[4] See footnote 2, *supra*, p. 4.

[5] The Court of Appeals for the Tenth Circuit, contrary to the district court's decision, applied the Act in 1958 to a price redetermination contract. *United States* v. *Barnard*, 255 F. 2d 583, certiorari denied, 358 U.S. 919.

learned of the kickbacks, it suspended the contract; the contract was cancelled a month later for "statutory violations" (F. 47, 49; App. pp. 111, 113–114).[6]

---

[6] In addition to the kickback violations, the Army found that Acme had violated the False Claims Act (31 U.S.C. 231) and was guilty of conspiracy and common-law fraud (F. 49; App., pp. 113–114). The Army also determined that there had been violation of Acme's contractual and statutory warranty against contingent-fee arrangements (10 U.S.C. 2306(b)). These contingent fee arrangements, like the kickbacks, involved Tucker and Norris. Acme hired Tucker in October, 1952, to solicit bid invitations from private firms and the government and agreed to pay Tucker a commission of 5 percent on resulting gross weekly sales up to $10,000 and 3 percent of sales over $10,000. Tucker agreed to split this commission with Norris. In its original bid, which was submitted by Norris as General Manager of Acme's Defense Work Department, and later on December 18, 1952 (one month before award of the prime contract), Acme executed government forms which represented that Acme "has not employed or retained a company or person (other than a full-time employee) to solicit or secure this proposed Contract" (F. 5, 8(a); App., pp. 44, 45–46).

Subsequently, on March 2, 1953, Acme hired Tucker and Norris on a full time basis, with part of their compensation depending upon the receipts of the plant at which the government contract was to be performed. On May 18, 1953, Acme, in response to a question as to Tucker's status, noted that he had been originally hired on a part-time commission basis, but as of "January 1953" (*i.e.*, the time Acme's contract was executed) he had gone on a full-time, non-commission employment (F. 8(f) and 9; App., pp. 47–48). The fact that Acme had been in violation of its contractual warranty against contingent fees for at least the first two months of its performance of the contract was not disclosed by that letter (F. 8(f); App., p. 47).

While the Court of Claims affirmed the Army's determination that both the False Claims Act and the contingent-fee warranty had been violated, it held that neither violation afforded a ground for termination of Acme's contract. See footnote 8, *infra*, p. 10.

2. *Proceedings Below.* In 1957, after failing to obtain an administrative settlement, Acme brought this action, alleging that the government's cancellation was a breach of contract, and seeking "full restitution of its costs" or, alternatively, damages. Acme contended that the Army had used the statutory violations as an excuse to mask the real reason for cancellation—the fact that 75 mm. recoilless rifles had become obsolete (F. 47; App. p. 111). The Court of Claims, however, found that the obsolescence of the rifles and Acme's illegal activities were both reasons for cancellation, and that either one of these reasons would have sufficed in the absence of the other (F. 50(a), App. pp. 114–115). Accordingly, the court explicitly rejected Acme's contention that the government had acted in bad faith (App. pp. 40–41).

The court found that Acme employees had accepted kickbacks (F. 18–25; App. pp. 56–64). The court held, however, that these activities did not justify cancellation of the contract and, hence, that the government was liable for breach of contract for cancelling the contract in July, 1954. The court reasoned that the Anti-Kickback Act provided for a specific civil remedy—recovery of the kickbacks—in addition to criminal sanctions, and that any further civil remedy was impliedly negatived. On this basis the court distinguished *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (the *Dixon-Yates* case), where the violation which was held to justify cancellation of a government contract involved a statute which provided only a criminal remedy. The court also concluded that the kickbacks here, unlike those in

the *Dixon-Yates* case, were not related to the negotiation and execution of the prime contract and thus did not taint the entire transaction, and that, unlike *Dixon-Yates*, the conspirators here had defrauded Acme as well as the government.[7] Finally, the court found it relevant that, although the 1960 amendment to the Anti-Kickback Act—which was concededly intended to apply to prior events—clearly covered these kickbacks, the application of the original Act to the government contract here involved was "highly questionable" (App. pp. 9–15).[8]

With regard to Acme's remedy, the Commissioner of the Court of Claims rejected Acme's contention that it was entitled to full restitution of its costs and held that the proper remedy was to award Acme the damages actually suffered by the government's

[7] Thus the court held that the conspirators' actions were not chargeable to Acme despite their responsible positions in the company. The court found that "it can scarcely be said that *plaintiff* (as distinguished from its agents) violated 'obvious ethical or moral standards'" (App., p. 14). In the court's view the *Dixon-Yates* case was different, because there the contractor "was not altogether innocent, since it was well aware of the possible conflict of interest" (App., p. 15).

[8] The court also found that Acme had violated the contractual covenant against contingent fees (F. 3–5, 9; App., pp. 43–44, 48; see footnote 6, *supra*, p. 8) and the False Claims Act. As to the contingent-fee violations, the court held that the government's delay in cancelling after learning of violations justified enforcement of the contract (App., pp. 3–9). As to the False Claims Act, the court found that the government had not shown intent to defraud, and that such intent was necessary to justify non-enforcement on this ground (App., pp. 19–25). We do not seek certiorari to review these aspects of the decision below.

breach, *i.e.*, to place Acme in the same financial position it would have been in if the government had not cancelled the contract (App. p. 25). While Acme had sustained a large loss on the contract (F. 14, 52. App. pp. 116–118), the Commissioner found that a portion of this loss would have been recouped during completion of the contract. The Commissioner therefore concluded that Acme should recover its post-cancellation expenses ($11,597) plus the difference between its loss on the completed portion of the contract ($673,053) and the amount it would have lost on the entire contract had it not been cancelled ($550,409) (Commissioner's opinion R. 88–96).

The Court of Claims reversed this determination as to the proper measure of damages. It held that Acme was not limited to recovery which would put it in the position in which it would have been had the contract not been cancelled; instead, it ruled, Acme was to be returned to the *status quo* before the contract, by recovering the value of the services it rendered under the contract, without regard to the contract price. The value of Acme's services, the court held, was to be measured by Acme's actual costs—far in excess of the contract price [9]—except to the extent that the government could show these costs to be excessive. The effect of the court's decision was thus to place Acme in a far better position than it would have been in

[9] The contract price was $384.95 per rifle (see F. 7, 13, App., pp. 45, 50). Acme spent $1,179.29 per rifle for the first 446 rifles and $690.21 for the remaining 717 rifles delivered prior to cancellation (F. 14, 52, App., pp. 51, 116–118).

had there been no cancellation of the contract by the government.

REASONS FOR GRANTING THE WRIT

The Court of Claims in this case has adopted a new measure of recovery in government contract cases, which awards the contractor sums beyond the damages which can be attributed to the government's asserted breach. This rule runs counter to valid procurement policies adopted by the Congress. The rule is likely, moreover, to have a substantial adverse financial impact upon the government in the administration of its procurement program. At the same time, the rule results in a windfall to the contractor. It permits recoveries potentially far in excess of the compensation the contractor would have received had the contract been fully performed by the government, and it is therefore wholly unjustified by any considerations of fairness or equity. In these circumstances, we believe that review by this Court is appropriate.

On the merits, the Court of Claims has ruled that patent violations of the Anti-Kickback Act by the executives of a prime contractor do not justify the government in cancelling the contract. This holding, in our view, dilutes the rule established in this Court in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, which sought to guarantee the integrity of the federal contracting process from corrupt conduct. The practical impact of this decision is also substantial. The Anti-Kickback Act applies to all of the government's negotiated contracts, which amount to more than $25 billion a year. By depriv-

ing the government of an important remedy against kickback violations, the decision at once threatens to increase the government's total costs and to lessen the incentive of government contractors to enforce honesty among their employees. For these reasons, we also ask the Court to review the correctness of the Court of Claims' interpretation of the Anti-Kickback Act.

1. The Court of Claims has held that, where the government is in breach of contract and the contractor is thereby prevented from completing performance, the contractor may require the government to reimburse him for all reasonable costs he has incurred.[10] Where, as in this case, the contract is not a profitable one for the contractor (because the contractor's costs would have exceeded the contract price), the result of the court's holding is thus (i) to place the contractor in a better position that he would have occupied had there been no breach, and (ii) to require the government to pay a price exceeding both the price set forth in the contract and the damage actually sustained by the contractor as a result of the breach.

This rule violates the explicit procurement policy that, where feasible, government supplies and services be purchased on a fixed-price basis after either competi-

[10] The new remedy apparently applies to any government contract which contemplates that certain parts of the contract will be performed by the contractor and will not be subcontracted—at least where the government has a reason for wishing a particular contractor to perform the work (see App., p. 28).

tive bidding or negotiation (10 U.S.C. 2306(c)).[11] The federal policy in favor of fixed-price contracts is also expressed in standard default and termination-for-convenience clauses, present in the contract in this case (F. 15, App. p. 15). These clauses limit the contractor's recovery, in cases where the government improperly terminates the contract, by reference to the contract price.[12] A rule of recovery which enables the contractor to disregard the contract price in recovering for his costs in excess of the contract rate stands in square conflict with these fixed-price policies.

---

[11] Where, as here, the contract is negotiated, the contracting official is required by regulation to obtain as many quotations as possible in order to arrive at the best possible terms for the government. (See 10 U.S.C. 2304(g); 32 C.F.R. 3-801.1 (1965); cf. 32 C.F.R. 1.301 (1954); see, also, *Paul* v. *United States*, 371 U.S. 245, 252-253). As to the preference for a fixed-price contract, the present regulation states: "whenever a reasonable basis for firm pricing exists * * *, the firm fixed-price contract shall be used, because its use under these circumstances will provide the contractor with a maximum profit incentive to control the costs of performance." 32 C.F.R. 3.402(b) (1965). The regulations in effect in 1953, when the contract here involved was executed, required use of fixed price contracts for negotiated procurements "unless conditions necessitate" otherwise. 32 C.F.R. 3.401 (1954). In addition, the regulations in 1953, and the present regulations, set forth a number of limitations on the use of cost-reimbursable contracts. 32 C.F.R. 3.405 (1965); 32 C.F.R. 3.405, 3.405-1, 3.406, 3.406-1 (1954).

[12] The standard default clause states that if the government's termination for default is improper because the contractor's default was excusable, recovery shall be measured by the termination for convenience clause. 32 C.F.R. 7.103-11 (1954); 32 C.F.R. 7.103-11, 8.707 (1965). The termination for convenience clause specifies that the contractor is to receive the contract price for items delivered, plus its costs for uncompleted portions of the contract limited by reference to the contract price. 32 C.F.R. 7.102-21, 8.701(e) (1954); 32 C.F.R. 7.103-21, 8.701(e) (1965).

This inconsistency is dramatically illustrated by the facts at hand. Acme was awarded the contract, after competitive quotations were obtained, at a price of $337.23 per rifle, subject to upward or downward revision, with a ceiling price of $384.95 (F. 7; App. p. 45). Other bids of $423, $484.05 and $684 per rifle were rejected (*ibid.*). Under the Court of Claims' rule, however, the government is now to be charged Acme's costs of $1,179.29 for each of the first 446 rifles it received, and $690.21 for the remaining rifles delivered prior to cancellation (F. 52(a), (c); App. pp. 116–118; see also *supra*, p. 30) except to the extent that the government can show these costs to have been excessive or illegal.

To be sure, as the Court of Claims pointed out (App. p. 28), the contract contemplated that the government, in addition to getting the rifles, would receive the benefit of having Acme as an additional competitor to established companies in the rifle field. This additional benefit was, however, part of the bargain for which the government agreed to pay the contract price; it is certain that Acme would not have been awarded the contract at the prices the Court of Claims now proposes to pay the contractor. In these circumstances, the government should not be required to compensate Acme in excess of the contract price.[13]

[13] It is true that there may be circumstances in which a contractor will be entitled to recover damages caused by the government's breach of contract in excess of the contract price for the goods and services to be received under the contract. This situation will occur where the government's wrongful conduct makes the contractor's performance more expensive than if the government had performed as promised. Damages beyond the contract price are justified in such a case in order to place the contractor in the position in which he would

We also challenge the decision as a matter of general contract law. While the cases are in some conflict, the federal cases have generally confined "restitutionary" recovery to the price specified in the contract.[14] Those situations in which recovery is allowed beyond the contract price are cases where the party responsible for the breach has derived some benefit by his breach which he must return in order to avoid unjust enrichment. In this case, the government was in no sense unjustly enriched, for it paid the contract price for the benefits it received. It is, moreover, only in an extremely technical sense that the United States can be said to have been at fault.[15] Acme and

---

have been had the contract been properly performed. See *United States* v. *Penn Foundry*, 337 U.S. 198, 208–209. The remedy which the Court of Claims now proposes to grant, however, is unrelated to, and far in excess of, the damages to the contractor resulting from the government's asserted breach; its remedy constitutes a windfall by putting the contractor in a better position than he would be in if the contract had been fully performed.

[14] See *L. Albert & Son* v. *Armstrong Rubber Co.*, 178 F. 2d 182 (C.A. 2). While the language of the Restatement of Contracts, on which the Court of Claims primarily relied, offers some support for the rule adopted by the court, we believe that the Restatement does not contemplate contracts, such as the standard government contracts, which explicitly limit recovery in event of termination by the government by reference to the contract price. See footnote 12, *supra*, p. 14.

[15] "Restitutional" recovery in excess of the contract price should be allowed, if at all, only where the defendant bears the major responsibility for the situation. See Palmer, *The Contract Price as a Limit on Restitution for Defendant's Breach*, 20 Ohio State L.J. 264, 278–9: "There are strong claims in favor of (a) allowing restitution of benefits conferred on another at his request and (b) of holding parties to their contracts; which claim is paramount should depend on a finding as to which party bears the major fault for the situation that has arisen."

its chief executive officers, by accepting kickbacks in violation of a criminal statute, were the primary wrongdoers. The government cancelled the contract on account of these violations, and the Court of Claims specifically found that in so doing the government acted in good faith (App. pp. 40–41).

2. We believe that the ruling of the Court of Claims that discovery of Acme's violations of the Anti-Kickback Act (41 U.S.C. 51 *et seq.*) did not justify the government's cancellation of the contract, seriously limits the scope of this Court's ruling in *United States v. Mississippi Valley Co.*, 364 U.S. 520 (the *Dixon-Yates* case). In that case the contractor was denied enforcement of a contract because of a violation of a conflict-of-interest statute by a government employee who was also an agent of a potential subcontractor. This Court's ruling that the contract should not be enforced was intended "to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction." 364 U.S. at 565.

The present situation differs from *Dixon-Yates* chiefly in the facts that here the conduct was engaged in solely by employees of the contractor, and that the corruption was not merely potential. As in *Dixon-Yates,* kickbacks are typically related to the negotiation and execution of a contract. In this case, for example, the Court of Claims' findings show that one of Acme's principal subcontractors—All Metals Industries, Inc.—participated in the negotiation of the principal contract at a time when it had a kickback

agreement with Tucker and that, in the course of the negotiations leading to execution of the prime contract, government representatives reviewed a complete cost breakdown of the bid, including a list of proposed subcontractors (F. 10, 18, 19, App. pp. 48–49, 56).

Nor does the fact that the Anti-Kickback Act, unlike the statute in *Dixon-Yates,* contains an explicit civil remedy—the recovery by the government of amounts paid out as kickbacks—call for the abrogation of the remedy of contract termination. Recovering the kickback alone does not adequately secure the integrity of the contracting process. Kickback arrangements affect the choice of subcontractors and they may inflate the price charged by subcontractors—a cost passed on to the government—well beyond the amount of the kickbacks paid to employees of the prime contractor. Moreover, kickbacks are by their nature secret, and, like other kinds of corruption, difficult to prove in amount. Thus non-enforcement is necessary, both to relieve taxpayers of the unjustifiably high—but unascertainable—extra expense of contracts which have been influenced by kickback corruption, and to provide an effective incentive for contractors to take measures to prevent kickback violations on the part of their employees. We note in this connection that there is no suggestion in the legislative history of a purpose to make the remedy of recovery of the kickbacks the exclusive civil remedy,

but merely to insure the right to such recovery in addition to the remedies ordinarily available against corrupt conduct.[16]

The Court of Claims also sought to absolve Acme of responsibility for the illegal kickback activities of its high ranking executives on the ground that the executives defrauded Acme as well as the government (App. pp. 13, 14). The court itself found, however, that kickbacks were taken by the general manager of Acme's chief plant (who was also the son of Acme's president and principal stockholder and a stockholder in his own right), as well as by the Acme officials in charge of operations, sales and government contracts (F. 16, 20; App. pp. 55, 58). Having chosen these officials to conduct its government contract business, Acme may properly be held responsible for their actions, even if designed to benefit themselves rather than Acme. *Gleason* v. *Seaboard Ry.*, 278 U.S. 349, 354–355; *Standard Surety & Cas. C.*, v. *Plantsville Nat. Bank*, 158 F. 2d 422, 424–425 (C.A. 2). Any other rule would undermine the contractor's incentive to insure the integrity of its employees.

Finally, the Court of Claims in some measure rested its refusal to apply the Anti-Kickback Act in this case on the proposition that it is "highly questionable" whether the kickbacks—which covered the period of 1952–1954—violated the Anti-Kickback Act as enacted in 1946, since that Act applied only to "cost

[16] H. Rep. No. 212, 79th Cong., 1st Sess., pp. 2, 5.

reimbursable" contracts while the contract here was a fixed price contract with a price redetermination clause (App. pp. 14–15). It is conceded, however, that these kickbacks violated the Anti-Kickback Act as amended in 1960, and that Congress explicitly made its amendment retroactive. (See 41 U.S.C. 51; S. Rep. 1585, p. 8, 86th Cong., 2d Sess.). In addition, the only appellate ruling on the question held the original 1946 Act applicable to price redetermination contracts as well as to "cost-plus" contracts. *United States* v. *Barnard*, 255 F. 2d 583, 588 (C.A. 10), certiorari denied, 358 U.S. 919. In these circumstances, and in light of the fact that the Acme officials involved in the kickback scheme here were guilty of "vicious and immoral" conduct, violating "obvious ethical or moral standards" (F. 31, App. pp. 65–66; cf. *Muschany* v. *United States*, 324 U.S. 49, 66–67), doubts as to the scope of the 1946 Act do not provide a basis for departing in this case from the ordinary rule that a contract found to be tainted with illegal and corrupt conduct should not be enforced.[17]

[17] The Court of Claims suggests that its ruling may not be important, since the government may draft a contract clause explicitly giving it the right to cancel for kickback violations. We are advised, however, that the Defense Department alone has awarded negotiated contracts at the rate of $22½ billion a year in fiscal year 1965, and is now awarding such contracts at an even higher rate. Even if a new contractual provision could be drafted for the future, a new clause would have no impact upon these contracts now in force.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

DAVID L. ROSE,
ROBERT V. ZENER,
Attorneys.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966

BLANK

PAGE

BLANK

PAGE

APPENDIX

In the United States Court of Claims

No. 349–57

(Decided June 11, 1965)

ACME PROCESS EQUIPMENT CO., TO ITS OWN USE, AND FOR THE USE AND BENEFIT OF NICHOLSON PRODUCTS COMPANY, STEEL HEDDLE MANUFACTURING CO., FOLEY MACHINE COMPANY, PATTERN MACHINE & FOUNDRY CORPORATION, INTRICATE MANUFACTURING COMPANY, JAIMIE KOHAN, D/B/A MANALAPAN MACHINE & WELDING WORKS, AND PITTSBURGH NATIONAL BANK, SUCCESSOR TO PEOPLE'S FIRST NATIONAL BANK & TRUST COMPANY, ASSIGNEE OF ALL METALS INDUSTRIES, INC. v. THE UNITED STATES

Jack Rephan for the plaintiff. *Solomon Dimond* and *George E. Palmer* of counsel.

James F. Merow, with whom was *Assistant Attorney General John W. Douglas*, for the defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

OPINION

DAVIS, *Judge*, delivered the opinion of the court:[1]

Plaintiff's first experience as a defense contractor was to bid on and win two negotiated Ordnance Corps contracts,

[1] The opinions and findings of Commissioner C. Murray Bernhardt in this case and its companion, *Acme Process Equipment Co. v. United States*, Ct. Cl., No. 538–59, decided this day, have been most helpful. The court has borrowed material from both opinions, although, in some respects, our results are different.

both of which soured into litigation.[2] In January 1953, Army Ordnance awarded a contract for the manufacture of 75 mm. recoilless rifles. This project was largely subcontracted, leaving for Acme only the final finishing and assembly of components, and the earlier job of fashioning the rifle barrels from rough forgings with machines furnished by the Government under a separate facilities contract. From the start, Acme was beset by serious production delays due to a combination of causes, among them its own inexperience, defaults by subcontractors, and defects in some of the government-furnished machines. Generous time extensions forgave many delinquent deliveries, but liquidated damages were assessed on others. After uncovering alleged violations of statutes relating to kickbacks, contingent fees, and conflicts of interest, Ordnance suspended work under the contract in July 1954 and canceled it two months later in August 1954. The purported infractions involved a clique of unprincipled employees of Acme, aligned with a stockholding minor executive of the corporation. In this suit for breach of contract Acme denies any violations and alleges that the charges of malfeasance were a smokescreen to enable the Government to cancel without cost a contract for the production of obsolete weapons no longer needed. In that manner, it is said, defendant hoped to avoid the heavy cost of a termination for its own convenience. Cancellation left Acme financially crippled, since it was unreimbursed for much of its large investment in contract performance. Plaintiff spent years in fruitless but nearly successful efforts to obtain settlement.

The Government's major defense still is that Acme is entitled to no recovery because it violated certain statutes and covenants (concerning contingent fees, kickbacks, false claims, and conflicts of interest). Should each of these absolute defenses be rejected, the plaintiff has requested us to grant recovery based on the theory of restitution, rather than the traditional remedy of damages usually awarded by this court. In addition to its objection to this form of relief, the Government asserts a partial defense based on plaintiff's lack of standing to sue on behalf of its subcontractors. The

[2] No. 538–59, *supra*, fn. 1, involves the other contract.

defendant also argues that, since plaintiff itself was responsible for delays, it is not entitled to recover delay-damages, and the contracting officer's assessment of liquidated damages was proper. Finally, Acme urges its right to interest on amounts due, on the ground that the Government's actions constituted a taking within the Fifth Amendment. We consider each of these aspects of the case.[3]

I. CANCELLATION

A. COVENANT AGAINST CONTINGENT FEES

The defendant contends that it validly canceled the contract in the summer of 1954 because (1) Acme misrepresented and concealed its employment of a part-time agent to secure government contracts; and (2) such an arrangement violated the covenant against contingent fees.

For many years prior to the events with which we are concerned, Acme enjoyed some prestige as a manufacturer of processing tanks, boilers, containers, and related equipment for the distillery, brewery, and sugar industries—a predominantly civilian market. In 1952 it sought to enter the field of government procurement to provide a cushion against the fluctuations of its commercial sales, particularly in periods of war-born material shortages. Lacking expertise in this prospective market, plaintiff engaged, in the early fall of 1952, the services of Harry K. Tucker, Jr., and James S. Norris, who represented accurately that they were experienced in government procurement procedures, but concealed their dishonorable intentions to victimize their employer. At first, the team was paid under an informal arrangement providing for commissions on sales and a minimum salary guarantee. On October 13, 1952, Tucker entered into an express one-year contract with Acme, whereby he and/or his "organization" agreed to serve as a "bona fide sales agent" on a part-time basis.[4] Under the agreement,

[3] This case, like No. 538–59, was tried and the Commissioner's report filed before the decision of the Supreme Court in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963). Neither party has preserved an objection to the receipt of *de novo* evidence, and we therefore need not concern ourself with that problem. *Stein Bros. Mfg. Co.* v. *United States*, Ct. Cl., No. 389–59, decided July 12, 1963, 337 F. 2d 861, and succeeding decisions in that line.

[4] It is impossible to ascertain whether the written contract superseded the prior informal agreement.

Tucker was to be paid a weekly minimum salary of $150, which would be increased to five percent of his weekly gross sales up to $10,000 (*i.e.*, sales by Acme under contracts obtained through him), plus three percent of such weekly gross sales in excess of $10,000. Minimum salaries paid prior to any sales by Tucker were to be deducted, later, from the excess of his commissions over his minimum weekly guarantee. The result was that the guaranteed weekly salary was a non-recoverable advance against commissions; Acme could, however, cancel the contract if commissions failed to cover the minimum salary guarantee. Norris and Tucker also entered into an agreement with each other that Norris would receive fifty percent of any fees paid Tucker by his other clients for enabling them to obtain subcontracts from Acme. Plaintiff was unaware of this latter arrangement.

Tucker shortly produced a deluge of inquiries, bid proposals, and invitations from both commercial and government sources. Among these were the invitations to bid on the contract at bar (Contract 1213), as well as the agreement (Contract 8580) which is the subject matter of the other suit, No. 538–59.

On October 23, 1952, Acme submitted its original bid for Contract 1213 to the Philadelphia Ordnance District. The bid form contained a provision requiring the contractor to represent whether it had or had not (boxes were supplied after each of the alternatives for inserting a mark to denote the correct fact) "employed or retained a company or person (other than a full time employee) to solicit or secure this contract." In its October 23rd bid, James S. Norris, as "General Manager of the Defense Work Department," certified that plaintiff had *not* retained such a person. Under a revised proposal, dated December 10, 1952, and also signed by Norris, plaintiff made a directly contrary representation. On December 18, 1952, however, Acme once again reversed its position. Joshua Epstein, president of Acme, executed a government form entitled "Contractor's Statement of Contingent or Other Fees", in which he, either accidentally or deliberately, filled in one of the two alternative boxes to indicate that Acme had not retained a part-time employee to secure the contract. This representation was incorrect, since

plaintiff had, in early October, hired Tucker on a part-time basis to solicit government contracts.

We assume, for this part of the case, that these misrepresentations, or the substance of the Acme-Tucker contingent fee arrangement, or both, breached the contract. But the crucial point is that the defendant, after obtaining knowledge of the facts, waited until over a year later before canceling the agreement. Could an election to cancel be delayed for such a time? We hold not. In our view, an election to annul the contract had to be made with reasonable promptness after the Government gained knowledge of the facts; by putting off its decision for an inordinately long period, the defendant lost the right it earlier had to terminate the contract without incurring any cost.[5]

As early as May 1953, the Philadelphia Ordnance District had sufficient information to determine whether Acme had previously made any misrepresentations relating to contingent fees or had violated the covenant. In June 1953, defendant nevertheless issued a supplemental agreement, which increased the number of rifles to be manufactured under the contract from 2,322 to 2,751 (an 18% increment). Despite the production difficulties it encountered, plaintiff continued manufacturing the rifles until Ordnance directed it to suspend all work under the contract on July 22, 1954. Cancellation for unspecified "statutory violations" followed on August 18, 1954.

This phase of the case—as distinguished from the Government's responsibility to reimburse Acme for payments to Tucker in violation of the covenant against contingent fees—is governed by the rule that, "[W]here a contract is breached in the course of its performance, the injured party has a choice presented to him of continuing the contract or of refusing to go on. If he chooses to continue performance he has doubtless lost his right to stop performance * * *." 5 Williston, *Contracts* § 683 (3d ed. 1961) (footnotes omitted); *e.g.*, *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F. 2d 915, 929–30 (C.A. 1), *cert. denied*, 364 U.S. 911 (1960); *Lichter* v. *Goss*, 232 F. 2d 715, 720 (C.A. 7, 1956). After dis-

[5] In both this case and its companion, we also reach the different question whether the Government can validly refuse to reimburse the plaintiff for payments made to Tucker.

covering the contingent-fee violations, defendant could not wait for over a year to decide whether it wished to annul the contract as a whole, on that basis. The sanction of contract cancellation is too drastic to permit a long delay. Beyond the time reasonably necessary to determine if there has been a misrepresentation or a violation of the covenant,[6] the defendant cannot allow an unwary contractor to continue performance and thus incur large expenses, all of which the Government will refuse to reimburse if and when it decides to cancel the contract on the ground of the violation. As this court said in *Companhia Atlantica* v. *United States*, 148 Ct. Cl. 71, 78, 180 F. Supp. 342, 347, *cert. denied*, 364 U.S. 862 (1960), "it would be a great wrong to permit the Government to awaken such a 'sleeper' to justify its cancellation * * *." In that case, the plaintiff had fully apprised the defendant of the contingent fee arrangement at the outset of negotiations, which lasted over a year. The Government then canceled its contract for the purchase of tungsten from the plaintiff less than two months after the agreement had been signed, and later sought to defend its action on the grounds that the covenant against contingent fees had been violated. Although the court found that there was no violation, it also based its decision on the alternative ground that the defendant had waited too long before annulling the contract. Here, too, we refuse "to awaken such a 'sleeper'."

The severity of contract cancellation makes the present case, in this aspect, wholly unlike one in which the Government simply attempts to recover or withhold funds paid in violation of the covenant against contingent fees. That type of action is governed by the principle that, where government officials have erroneously or illegally paid out money, mere delay in seeking its recovery will not preclude a suit by the United States. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538–59, slip op. pp. 17–19, decided this day. But when the Government *cancels* an entire contract because

[6] We take into account, in establishing what was a reasonable time for determining whether the covenant against contingent fees was violated, the fact that an evaluation of all the circumstances surrounding the arrangement is often necessary. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538–59, slip op., pp. 12–16, 19, decided this day. But, as pointed out *infra*, the fourteen months which the Government waited before canceling Contract 1213 was an unreasonable delay even by lenient standards.

of a breach of the covenant, it can refuse to reimburse the contractor, not only for wrongful or illegal expenditures, but also for amounts to which the contractor would otherwise be legally entitled. To avert extreme hardship, we think that the Government is obliged to take such a course within a reasonable time after it has discovered the breach.[7]

The defendant does not seem to question that an unconscionable delay in raising a misrepresentation or a violation of the covenant against contingent fees as a ground for annulment will preclude the Government from thereafter urging that defense. It contends instead that there was no unreasonable delay, because the Government did not discover all the material facts until shortly before the actual cancellation. The evidence fails to bear out this argument.

In connection with its other major government contract ("8580"), Acme correctly represented, on November 4, 1952, in the bid which it submitted to Rock Island Arsenal that it had employed a part-time agent to obtain the contract. On or about December 12, 1952, Rock Island received from plaintiff a formal "Contractor's Statement of Contingent or Other Fees," to which was attached a copy of Acme's employment contract with Tucker dated October 13, 1952. Contract 8580 was awarded to plaintiff by Rock Island on January 8, 1953, but was administered by the Philadelphia Ordnance District,

---

[7] There are situations in which the Government can cancel a contract notwithstanding the amount of time elapsing between discovery of the violation and termination of the contract. Such cases, however, involve more than a plain material breach of the contract, as is the case here. See *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), in which the Supreme Court held that a government contract for the construction and operation of a power plant was unenforceable, on the ground that a federal conflict-of-interest statute, 62 Stat. 703, 18 U.S.C. § 434, had been violated in securing the contract. That *penal* provision "speaks in broad, absolute terms," establishing "a rigid rule of conduct" (364 U.S. at 550, 551), and its violation may result in imprisonment for up to two years and/or the imposition of a fine not to exceed $2,000.

The only legislation with which we are now concerned is the Armed Services Procurement Act of 1947, § 4, 62 Stat. 21, 23, 10 U.S.C. § 2306(b), which is not a penal statute. It requires that a covenant against contingent fees be inserted in contracts such as plaintiff's and states that, in the event that the covenant is breached, the Government *may* (*i.e.*, in its discretion) either deduct the commission from the total contract price or annul the contract. Congress gave the defendant a choice, and did not require the voiding of the contract. The violation of the covenant against contingent fees in this case was thus not conduct that was illegal *per se*, as in *Mississippi Valley Generating Co.* It was a contractual breach, which the defendant could, under the statute, elect to ignore. Our holding today is that, under that statute, the election to annul could not be unreasonably delayed.

the same agency which handled present Contract 1213 from its inception. Thus, even prior to the award of Contract 1213 to Acme on January 27, 1953, the contracting Ordnance District had access to the Tucker employment agreement, which was physically incorporated in the Contract 8580 file, although the District had no particular reason to refer to that part of the file.[8]

On May 18, 1953, the Ordnance District was again told of the agreement between Acme and Tucker. Plaintiff informed representatives of the Ordnance District that Tucker had been a full-time employee since January 1953, that his original part-time contract on a commission basis had been ended, and that he had received no commissions under the prior agreement. The letter also referred to the contingent-fee statement previously filed with the Rock Island Arsenal and asked that it be withdrawn.[9] See finding 8(f). The defendant was thus told that (1) at the time that the plaintiff made its bid and negotiated for Contract 1213, it had in its employ a part-time agent whom it had hired to solicit government contracts; and (2) that agent was Harry K. Tucker, Jr., who, along with his father, had been under surveillance by the Government for suspected statutory violations in connection with prior contingent fee arrangements. Finding 3. Furthermore, by referring back to the bid and the related forms which Acme submitted to Ordnance in connection with Contract 1213 (and to which Acme specifically referred), the Philadelphia Ordnance District could easily have discovered the prior misrepresentations. Yet the defendant waited for fourteen months before canceling the contract. During this period the plaintiff continued to perform and to incur expense.

The Government seeks also to justify the delay on the ground that it was not told *all* the relevant facts until shortly before it canceled. It emphasizes an alleged informal agreement between Tucker and plaintiff's president, entered into

---

[8] Plaintiff seeks to impute knowledge of the Tucker contract to the Ordnance District as of January 1953, but we see no basis for such an imputation.

[9] The May 18, 1953, notification included one incorrect statement. The letter said that Tucker had been a full-time employee since January 1953, whereas the contract under which he began working full-time was not effective until March 1953. However, this error did not conceal the existence of the contingent-fee relationship.

when he first began working for Acme in the fall of 1952. Under that agreement, Tucker was to receive a three percent commission, which he agreed to share equally with Norris. But the only evidence in the record of this arrangement is a written statement made by a General Accounting Office investigator in June 1955, on the basis of an interview with Joshua Epstein, Acme's president. Even if we accept at full value this second-hand statement made three years after the events, there is no way of knowing whether the alleged informal agreement was superseded by Tucker's written contract. If that was the case—which it might well have been—this commission-splitting agreement lasted no more than two weeks. In this state of the proof we cannot give any significance to this alleged side-agreement. Other than the information referred to in footnote 9, *supra*, this is the only "fact" which the Government can point to as remaining undisclosed after May 1953. We do not hesitate, therefore, to conclude that the defendant had sufficiently full knowledge of the contingent-fee arrangement as of May 1953, and could not delay until July 1954 to elect on that ground to exercise the drastic remedy of complete cancellation.[10]

B. ANTI-KICKBACK ACT

The Tucker organization victimized Acme chiefly through the receipt of illegal kickbacks. Unknown to plaintiff, various small manufacturers in the metals field had service contracts with Tucker similar to the one he had with Acme. Under those agreements, Tucker received a minimum weekly guarantee, as well as commissions for obtaining contracts. When plaintiff, through Tucker and Norris, let subcontracts to secret clients of the two conspirators, each subcontract necessarily contained an amount to cover the fee paid to Tucker and shared by Norris. Since the pair not only prepared Acme's government contract bids, but also negotiated all its related subcontracts, they were in a splendid position to mulct their employer.

[10] As pointed out in the opinion in the other *Acme* case, No. 538–59, the facts known to defendant by the Spring of 1953 were sufficient to call for an election at that time to use the severe remedy of total cancellation, but the Government's delay after these facts were known was not sufficient to constitute an affirmative waiver of the defendant's conventional right to refuse to reimburse Acme for its illegal payments to Tucker. There is no inconsistency.

The subcontract let to All Metal Industries, Inc. is the most flagrant example of the Tucker-Norris extortion scheme. More is involved than the secret commissions which the two received from All Metals for enabling it to secure subcontracts from the plaintiff. In addition, Tucker, Norris, and Jack Epstein, who was a plant superintendent and minor stockholder of Acme,[11] forced All Metals to agree to pay $23,500 to them through Gunn Engineering Company, a dummy corporation. It was understood that All Metals would pass this cost on to Acme by including it in the subcontract price. All Metals actually paid $12,000 to Gunn under the agreement. When the conspirators later became fearful of exposure, they attempted to expunge all evidence of the transaction from the subcontractor's books. Through an oversight, however, they left in the cost-structure of All Metals' ultimate subcontract price to Acme the $12,000 already paid to Gunn Engineering Company (although this sum was more than offset by Tucker's waiver of certain commissions which All Metals owed him). Even after All Metals decreased its ultimate price to less than that contemplated prior to the extortion scheme, the reduced price still reflected some portion of the combined fees which All Metals had paid or agreed to pay to Tucker and Gunn. Bookkeeping technicalties tend to obscure this fact, but, in the final analysis, had Contract 1213 been of a cost-reimbursable nature, the Government would ultimately have borne part of the cost of the kickbacks. See findings 20 and 21.

The arrangements between Tucker and other firms for which he obtained subcontracts from Acme were less complex, but hardly less reprehensible. For instance, Manalapan hired Tucker in November 1952 and agreed to pay him $100 weekly as a nonrecoverable advance against commissions. As a result, Manalapan obtained a series of small purchase orders from Acme under Contract 1213 from February through July 1953. The subcontract prices hid the $1,350 in

[11] Jack Epstein was the son of Joshua Epstein, president of Acme. There is no evidence, however, that Joshua Epstein knew anything about the kickbacks which Tucker and Norris were receiving from subcontractors or the extortion scheme they carried out with his son. Nor is there persuasive evidence that any Acme employee or official other than the conspirators was aware of these illicit activities.

commissions and/or salaries which Manalapan paid Tucker and which Tucker shared with Norris. The conspirators entered into comparable agreements with several other subcontractors. See findings 18–25. These subcontractors knew or should have known that Tucker was Acme's agent, but the responsible officials of Acme were not aware of the double agency.[12]

In these circumstances, the defendant claims that Acme violated the Anti-Kickback Act, 60 Stat. 37, as amended, 41 U.S.C. § 51, and that that violation authorized the Government to cancel the contract. The Anti-Kickback Act, first enacted in 1946, was significantly amended in 1960. 74 Stat. 740. Both versions retroactively prohibit the payment of any compensation or gratuity by a subcontractor to an agent, employer, or official of a higher tier subcontractor or a prime contractor with the United States. By the terms of the statute, such compensation is conclusively presumed to be included in the price ultimately paid by the Government, and the United States may bring a civil action against the prime contractor, subcontractor, or the agent to recover that amount. Along with this civil remedy, the statute provides criminal penalties against persons knowingly making or receiving prohibited payments. Under the 1946 Act, coverage is limited to government contracts on a "cost-plus-a-fixed-fee or other cost reimbursable basis."[13]

---

[12] Citing *Carrier Corp.* v. *United States*, Ct. Cl., No. 346–59, decided Feb. 14, 1964, 328 F. 2d 328, the Government claims that the wrongdoers were given broad apparent authority by the plaintiff, and that Acme is therefore bound by their acts. Even if the premise is true, the conclusion does not follow. Imputation of an agent's actions to his principal is precluded where the agent's action is taken for the purpose of defrauding the principal. 3 Fletcher, *Private Corporations* § 826 (rev. ed. 1947); *e.g.*, *Maryland Casualty Co.* v. *Tulsa Industrial Loan & Investment Co.*, 83 F. 2d 14, 16–17 (C.A. 10, 1936). Since the commissions which the Tucker organization received from subcontractors increased their charges to Acme, plaintiff was being swindled by its own agents.

[13] The statute, as originally enacted in 1946, provided: "[T]he payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as hereinafter defined, (1) to any officer, partner, employee, or agent of a prime contractor holding a contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever, on a cost-plus-a-fixed-fee or other cost reimbursable basis; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract

Tucker, Norris, and Jack Epstein were indicted for violation of the Anti-Kickback Act and brought to trial in the United States District Court for the Eastern District of Pennsylvania. After presentation of the Government's case, in April 1956, a defense motion for acquittal was granted on the ground that the statute did not apply to this type of contract. The district judge felt that a negotiated fixed-price contract, with a price redetermination provision permitting a retrospective or prospective increase within a narrow range, was not a cost-reimbursable contract within the meaning of the Act. The court made scathing comments as to the conduct of the accused, observed that Acme had been victimized, and recommended legislation to amend the statute to apply to this situation. Because of the uncertainty with regard to the coverage of the 1946 Act, the Comptroller General thereafter recommended to Congress that it be revised. In the Act of September 2, 1960, an amendment was adopted which retroactively broadened the coverage of the statute to include all negotiated contracts (defined to mean all contracts made without formal advertising). No other essential change was made. 74 Stat. 740, 41 U.S.C. § 51.

The Government first claims that it was entitled to cancel Contract 1213 for violation of the original Anti-Kickback Act. It asserts that when Congress, in 1946, provided a civil remedy entitling the Government to recover the amount of

---

or order previously awarded, is hereby prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise owing to the subcontractor either directly by the United States, or by a prime contractor under any cost-plus-a-fixed-fee or cost reimbursable contract, or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor."

the kickback, it did not intend to alter the pre-existing common law remedy of contract cancellation. The major stumbling block is the absence, so far as we know, of any decision or comment in support of the proposition that there was such a remedy at common law. In fact, the House Report on the 1946 Act states, "There is no existing statutory or other authority of law under which it may be said that the United States clearly has a right to recover the amounts of any such fees or gratuities." H.R. Rept. No. 212, 79th Cong., 1st Sess. 2 (1945). *A fortiori*, it is highly doubtful that there was any pre-existing right of the Government to cancel the entire contract of a prime contractor whose agents received improper kickbacks of which he was unaware.

In its effort to invoke a forfeiture, the most drastic civil penalty known to common law, the Government has cited only sparse collateral support. There are statements in *United States* v. *Davio*, 136 F. Supp. 423, 428 (E.D. Mich., 1955), that the Anti-Kickback Act codified the prior common law remedy. But that suit was for the recovery of amounts paid as kickbacks. Nowhere does the court hint that the *Government* had a pre-existing right of contract cancellation in the present circumstances.[14] Whether it was codifying an existing right or creating a new one, Congress, when it enacted the 1946 legislation, gave the Government only one civil remedy against contractors whose agents had received secret kickbacks. Had the legislature wished to provide the additional remedy of contract annulment, it could have done so. *Cf.* Armed Services Procurement Act of 1947, § 4, 62 Stat. 21, 23, 10 U.S.C. § 2306(b). In the absence of any statutory indication that the Government has a right to cancel the contract in this situation, it is not for the court to engraft a new and drastic remedy onto the Anti-Kickback Act. *Cf. Unexcelled Chemical Corp.* v. *United States*, 137 Ct. Cl. 681, 684 149 F. Supp. 383, 385 (1957).

---

[14] It is of course clear that "a person who knows that another has employed an agent to conduct a transaction with him is subject to liability to the other for secretly employing the [agent] to act on his account in the transaction. * * * The defrauded principal can rescind the transaction with the other principal * * *." Restatement, Agency 2d § 391, Comment "g". That principle would have enabled Acme to cancel its agreements with the subcontractors, but it could not give the defendant a right to cancel its contract with Acme. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538–59, decided this day, slip op., p. 20, *et seq.*

Furthermore, we have grave doubts about the applicability of the 1946 Act to the present contract. If it is not applicable, the Government's position must be rejected for the additional reason that in 1953 and 1954 there was no recognized federal public policy invalidating Contract 1213. *Cf. Muschany* v. *United States*, 324 U.S. 49, 66–67 (1945).[15] If the 1960 anti-kickback legislation was the first provision covering Contract 1213, the improper actions which took place in 1953 hardly contravened "long government practice or statutory enactments."[16] When Acme's agents received kickbacks about which plaintiff had no knowledge, it can scarcely be said that *plaintiff* (as distinguished from the agents) violated "obvious ethical or moral standards", and that its contract with the defendant could therefore be canceled on that ground.

The unreported district court decision granting the motion for acquittal of Tucker, Norris, and Jack Epstein is, of course, a direct holding that the 1946 anti-kickback legislation did not cover the present contract.[17] One of the primary reasons behind the enactment of the 1960 amendment was to remove serious doubt that fixed-price contracts with redetermination clauses were included in the act's coverage. See S. Rep. No. 1585, 86th Cong., 2d Sess. 2–6 (1960). While the Tenth Circuit has held that the 1946 Act covers certain contracts having price-redetermination provisions, it emphasized that the contract with which it was dealing had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward." *United States* v. *Barnard*, 255 F. 2d 583, 588 (C.A. 10), *cert. denied*, 358

---

[15] "It is a matter of public importance that good faith contracts of the United States should not be lightly invalidated. Only dominant public policy would justify such action. In the absence of a *plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards*, this Court should not assume to declare contracts of the War Department contrary to public policy. The courts must be content to await legislative action." (Emphasis added.)

[16] Like its predecessor, the 1960 statute was given retroactive effect, and thus might conceivably be a "statutory enactment" on the basis of which the contract could be canceled. This would result, however, in the use of legislation enacted in 1960 to condemn conduct taking place in 1953–1954, and to justify a forfeiture. We think the Court in the *Muschany* case was referring to "statutory enactments" *in esse*.

[17] The district court decision in the criminal case does not collaterally estop the Government from asserting the applicability of the 1954 Anti-Kickback Act to the present contract. See *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 492–94 (1950).

U.S. 919 (1958). Acme's contract, however, had a limited range of upward revision. See finding 15. The applicability of the 1946 Act to Contract 1213 is thus highly questionable.

For these reasons, the present case is not like *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). There, the dual agent violated a federal conflict-of-interest statute, 62 Stat. 703, 18 U.S.C. § 434, in the negotiation of a contract entered into with the United States. Unlike our case, the statutory provision which the agent violated was undoubtedly on the books at the time of the misconduct. Also, the statute itself provided no more than a criminal sanction. Had the Supreme Court refused to imply a civil remedy, "the public [would] be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent." 364 U.S. at 563. Here, the civil remedy established by the statute enables the Government to recover any amounts it has paid out as a result of kickbacks; the public does not bear any part of the expenses illegally incurred. And most significantly, the violation in *Mississipi Valley Generating Co.* affected the validity of the entire transaction. In the negotiations preceding the contract, the Government was represented by a consultant who was, at the same time, associated with an investment banking company which stood to profit if the plaintiff was awarded the contract. The contract was the result of these tainted negotiations. In addition, the plaintiff itself was not altogether innocent, since it was well aware of the possible conflict of interest. 364 U.S. at 565 n.19. The kickbacks with which we are concerned, however, were in no way related to the negotiation and execution of Contract 1213, and do not affect its validity. They were separate transactions made without the knowledge of the plaintiff, which certainly had nothing to gain by these secret dealings. The principles of *Mississippi Valley Generating Co.* do not require or suggest that the contract at bar could or should be canceled because of the secret receipt by Tucker-Norris of kickbacks from subcontractors.[18]

[18] The defendant urges that a ruling against cancellation will render it impossible for the Government to annul an agreement with a prime contractor after discovering that its agents have secret kickback arrangements with its

Defendant urges that Acme's employment of Harold J. Lee and Charles G. Hochstuhl contravened certain provisions of the federal conflict-of-interest statutes, thereby making the contract voidable by the Government.

In the early stages of contract performance Acme was experiencing production problems with machines and tooling supplied by the Government under a companion facilities contract. At plaintiff's request Watervliet Arsenal ordered Harold J. Lee, a machinist lead foreman at the Arsenal, to report to Acme's Lansdale plant to assist plaintiff in its technical problems. Under his official orders Lee worked at Acme's plant from his arrival on April 20 until April 24, 1953, at government expense. The Arsenal refused Acme's request that it loan Lee's services for an additional week at government expense. Instead, Lee was given official permission to remain at the plant, advising plaintiff in an absent-without-pay status from April 27 to May 1, 1953. During this latter period he worked 96 hours, for which Acme paid him $5 per hour plus hotel expenses (compared to his government salary rate of $2.60 per hour). The amounts paid by Acme to Lee were charged against Contract 1213. Plaintiff was pleased with Lee's services and commended him to Watervliet Arsenal. Upon his return Lee filed with the Arsenal a trip report, which described the production problems he had observed and the advice he had given Acme personnel for their solution. In large part the report reflects the inexperience of Acme's personnel and their lack of necessary equipment. There is no evidence of any improper conduct on the part of plaintiff or of Lee—aside from the propriety of his being hired at all. The defendant concedes that Lee's employment by plaintiff did not affect his impartiality, a fact which is evident from the contents of his report and the effect of his testimony as a witness at the trial of this case.

---

subcontractors. We see no such consequence. If the defendant wishes to provide itself with that remedy, it may do so by inserting a "covenant against kickbacks" (similar to the covenant against contingent fees) in all its contracts. And the Anti-Kickback Act may be amended to provide that special relief, if it is desirable.

A federal statute precluded any "employee of the United States or any department or agency thereof" from receiving "any compensation for any services rendered * * * in relation to any * * * contract * * * in which the United States is a party." 62 Stat. 697.[19] During the week he received a salary from Acme, Lee was not on the Government's payroll at all. We are not concerned with the undercover activities of an employee who pretends to be working for the Government while secretly performing services for a contractor. During that week, Lee received a reasonable salary from plaintiff and performed valuable services about which the defendant was fully informed. It may well have been poor judgment for Acme to hire, or the defendant to permit the hiring of, Lee's services under this arrangement (rather than detailing Lee for an extra week to Acme's plant on the Government's payroll). The fact remains that both parties acquiesced in the arrangement so that, for one week, Lee was not working for the Government at all; in effect, he became an Acme employee. As such, the compensation which he received did not fall under the statute and the harsh sanction of forfeiture need not be considered.

After Contract 1213 was awarded to Acme, Charles G. Hochstuhl of Philadelphia Ordnance District was assigned to administer it, along with other contracts. As part of his duties in connection with 1213, Hochstuhl recommended changes in the delivery schedule, and journeyed to Ohio in March 1953 in the company of Acme officials to show them existing gun-manufacturing facilities.[20] He was removed from his position with the Government effective August 4,

[19] The conflict-of-interest provisions allegedly violated have since been superseded by Public Law 87-849 (76 Stat. 1119, 18 U.S.C. §§ 201 et seq.), enacted October 23, 1962, an omnibus exposition and revision of all statutes in the field of conflict-of-interest, bribery and graft relating to government employment. Since the acts complained of occurred prior to the omnibus measure they must be tested against the law then extant, but useful information on the purpose of the superseded statutes is available from the legislative background and content of the latest compendium.

[20] On his return to Philadelphia Ordnance District from this trip, Hochstuhl submitted a voucher and was paid for his per diem and other trip expenses. An Acme employee had paid $12.50 for Hochstuhl's hotel room charges on the trip, and this expense was charged by Acme against the contract. The defendant suggests that this payment violates the conflict-of-interest provision discussed in connection with Lee. Even if it were a violation, the $12.50 gratuity would not justify cancellation of a $1,200,000 contract.

1953, "* * * for making material false statements and exaggerations on [his] application standard Form 57," relating to prior private employment. During his notice period, Hochstuhl looked for other work and was employed by Acme in August 1953, immediately following his release. The defendant advised Acme at the time that, for two years thereafter, Hochstuhl could not engage in negotiations with his former employer concerning Acme's contracts.

During the first few weeks of his employment by Acme, Hochstuhl helped Norris as a subcontract expediter. After Norris was discharged in September 1953 and replaced by Jack Epstein as superintendent of the Lansdale plant, Hochstuhl was designated Epstein's assistant. As such he was given a variety of assignments, all of them involving one form or another of paper work. He established a control system for subcontracts, prepared letters to Ordnance for signature by others, correlated plant inspections, and assisted in the preparation of requests for change orders. He had no personal contacts with government representatives in connection with plaintiff's contracts.

In the fall of 1953 Hochstuhl came across a number of vouchers and other cost records in the files, which related to repairs made by Acme to government-owned machines supplied under Facilities Contract 1214 (related to Contract 1213). On his own volition and in the interest of keeping adequate cost records, Hochstuhl undertook to segregate and allocate the cost records to individual machines; thereafter, as additional repairs were made to the machines, he kept a running record of them. There is no suggestion that this record was originally made for the purpose of a claim against the Government; in the fall of 1953 there was no prospect of the contract cancellation which took place in July–August 1954. In September 1954, at the direction of his superiors, Hochstuhl prepared an up-to-date record of Acme's expenditures in repairing the various government-owned machines. It was based on the data he had compiled a year earlier and had kept current in the meantime. The cost record was attached to a letter from Acme (signed by Sidney Cohen, its secretary-treasurer) to Ordnance on September 7, 1954, in which plaintiff refused to return the

machines to the Government unless it gave assurance that Acme would be reimbursed for its cost of repairs. See finding 53.

The defendant charges that Hochstuhl's participation in the preparation of Acme's claim for reimbursement violated a penal conflict-of-interest statute, which provided that, "within two years after the time when [federal] employment or service has ceased," a former government employee may not "prosecute * * * any claims against the United States involving any subject matter directly connected with which such person was so employed." 62 Stat. 698. Casting aside any doubts that Hochstuhl's work for the defendant was "directly connected" with a claim made by Acme, we reach the question whether his services for Acme amounted to "prosecution" of such a claim. Hochstuhl simply compiled data on which his superiors based a claim which they presented to the Government. The basic information was first assembled by him purely as a matter of record-keeping, *i.e.* before there was any specific thought of a claim. Moreover, Hochstuhl's participation in the total claim process was merely clerical in nature. Other personnel in plaintiff's employ could just as readily have performed the relatively simple duties involved in compilation of costs relating to repair of machines, and his prior government service gave Hochstuhl no special knowledge or inside contacts which contributed to the undertaking in any way that we can see. There is a complete absence of evidence that Hochstuhl participated in the presentation of the claim to the Government after he had completed his assignment. On these facts, we hold that Hochstuhl's activities did not violate any conflict-of-interest statute or afford the defendant a valid basis for annulment of the contract.

D. FALSE CLAIMS ACT

The last reason which the defendant gives for vitiating the contract is the presentation of certain allegedly false claims for payment, both before and after cancellation. As a result of these submissions, the Government argues, Acme's claim was subject to forfeiture under 62 Stat. 978, 28 U.S.C.

§ 2514,[21] and the corporation may be fined under the False Claims Act, 12 Stat. 696, 31 U.S.C. § 231.[22]

In offering cost figures to the Government on April 29, 1954, in support of its request under the price-redetermination clause for allowance of the maximum ceiling price, plaintiff included certain costs which, while actually expended, are said by defendant not to have been properly chargeable to this contract. These were: subcontractors' costs which included without specification commissions which they had paid to the Tucker group; $12,000 which All Metals had included in its subcontract price to Acme as a result of the extortion scheme carried out by Tucker, Norris and Jack Epstein; payments of salaries and/or commissions by plaintiff to Tucker; $1,045.52 charged by Norris against the contract for personal services rendered by plaintiff's employees on Norris' farm (the facts of which were first discovered by the Government in December 1953); $470 plus hotel expenses paid by plaintiff to Harold J. Lee, whose services have previously been described; and minor hotel, meal and entertainment charges for government employees. The defendant's Board of Awards approved the requested increase in the price on the basis of revised data, but final action was not taken because the contract had been canceled in the meantime.

Another set of allegedly false claims came during the pendency of this suit when the parties held settlement negotiations. In conjunction with these efforts, plaintiff submitted the fiscal aspects of its claim to the Government in August 1958 on a standard contract-termination form, certifying in part that "they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United

---

[21] The statute provides: *"Forfeiture of fraudulent claims.* A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture."

[22] The relevant portions of this statute read as follows: *"Liability of persons making false claims.* Any person * * * employed in the service of the United States, who shall make or cause to be made * * * any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit * * *."

States * * *." In its proposal, plaintiff reclassified several of the previously-mentioned cost items as General and Administrative expenses rather than direct charges, thus allocating only a portion of them to the performance of Contract 1213. This settlement claim was subsequently rejected.

With some modifications the same cost items were again submitted by plaintiff in June 1961 in response to the issuance of an order by the court under former Rule 28(b). This last submission, which dealt separately with the plaintiff's claims and those of its subcontractors, was accompanied by a letter in which plaintiff said that it had not audited the subcontractors' claims but believed them to be accurate; the covering letter also invited the Government to confer with plaintiff as to any items in the claim which were not properly includable. This Rule 28 damage schedule eliminated certain costs which had been objected to in the termination settlement proposal (payments to Lee, expenses in connection with Norris' farm, certain travel expenses of Tucker, and a few entertainment expenses). Other controverted expenditures were, however, retained in the category of General and Administrative expenses, so that they were proportionately allocated to the contract in suit (*i.e.*, Tucker's salaries and/or commissions paid by plaintiff and the subcontractors).

The defendant has asked not only that the plaintiff's entire claim be forfeited for practicing "fraud against the United States in the proof * * * thereof" (62 Stat. 978, 28 U.S.C. § 2514, *supra*); it has also filed a counterclaim under the False Claims Act, 12 Stat. 696, 31 U.S.C. § 231, *supra*, seeking an affirmative judgment of $6,000 for plaintiff's misrepresentations in the price redetermination proceedings, in the termination settlement proposal, and in the schedule submitted pursuant to former Rule 28(b). But "fraud, resulting in forfeiture, can be found only on the basis of clear and convincing evidence." *Chelsea Factors, Inc.* v. *United States*, 149 Ct. Cl. 202, 212, 181 F. Supp. 685, 691 (1960). In the Government's effort to supply such "clear and convincing evidence," there is at least one large gap. Plaintiff's costs, exclusive of those challenged as improper, overwhelmingly exceeded the contract ceiling price for which

the application in April 1954 was designed to obtain approval. In a letter sent to the Philadelphia Ordnance District in connection with the application, Acme's accountants noted that certain "recommendations of the Army Audit Agent as to record keeping were not followed because the difference between the ceiling price and the actual costs incurred was so great that any further expenditures on this job should not be undertaken unless * * * absolutely necessary." At the same time, the accounting firm pointed out that the Army would have to disallow $600,000 of Acme's costs in order to fall below the ceiling price of $1,191,077. Defendant's Exhibit 70. The inclusion of the controverted items was thus unnecessary to justify receipt of the ceiling price. Plaintiff had nothing to gain by insertion of these disputed amounts in its claim. That circumstance strongly tends to negate the affirmative intent to defraud which defendant must establish.[23]

Moreover, at the time of the submission of the 1958 and 1961 claims, and probably as early as the initial claim in April 1954, the defendant was aware of the facts concerning each of the allegedly false items. Also, the plaintiff had actually expended the sums involved and, at least in several instances, the propriety of charging them as contract costs, either directly or indirectly by allocation through an overhead account, was debatable or a matter of judgment. While the inclusion of these items may have displayed poor judgment, we are not convinced, in the circumstances, that the plaintiff was endeavoring to deceive.[24]

Citing *United States* v. *Fox Lake State Bank*, 225 F. Supp. 723, 724–25 (N.D. Ill., 1963), defendant argues that it is required, as a precondition of forfeiture, to show only that Acme knowingly submitted false claims. But *Fox Lake* involved the False Claims Act, 12 Stat. 696, 31 U.S.C. § 231,

---

[23] Defendant claims that the ceiling price is a reflection of all the items submitted in the claim, and therefore, if allowed, it necessarily includes a proportionate part of the allegedly improper costs. The argument might be more convincing if plaintiff's costs had not so greatly exceeded the ceiling price. In the present context, the Government's contention ignores reality.

[24] Defendant mistakenly relies on *Wagner Iron Works* v. *United States*, 146 Ct. Cl. 334, 174 F. Supp. 956 (1959). That case was unlike this one in a number of ways. It involved flagrant padding by inclusion of personal expenses in a cost-plus-a-fixed-fee contract. Furthermore, the scheme was carried out by the corporation's sole stockholders, whose personal intent to defraud the United States was clearly established.

which does not encompass forfeiture as a sanction. To justify cancellation of the contract, the Government must prove its case under 62 Stat. 978, 28 U.S.C. § 2514, which provides for forfeiture of claims made by "any person who corruptly practices or attempts to practice any fraud against the United States." The statute also requires that the Court of Claims "specifically find such fraud or attempt." An actual intent to defraud is a prerequisite to annulment of the contract under these provisions. See *e.g.*, *Pewee Coal Co.* v. *United States*, 142 Ct. Cl. 796, 806, 161 F. Supp. 952, 958 (1958), *cert. denied*, 359 U.S. 912 (1959); *Kamen Soap Products Co.* v. *United States*, 129 Ct. Cl. 619, 641, 124 F. Supp. 608, 620 (1954).

For the same reasons, a related defense asserted by the Government must likewise fail. The defendant contends that, independently of any statutory provision, it was entitled, on the basis of *Carrier Corp.* v. *United States*, Ct. Cl., No. 346–59, decided Feb. 14, 1964, 328 F. 2d 328, to cancel the contract for the fraudulent and illegal acts of the contractor. But in *Carrier* the court stated unequivocally, "There is no doubt that a fraud was committed." Slip op., p. 11, 328 F. 2d at 334. In the present case, we have, as we have said, very grave doubts that Acme, through submission of the disputed claims, ever intended to defraud the Government. Defendant has failed to bear its burden of proving the defense of fraud.[25]

We come now to defendant's counterclaim for $6,000 under the False Claims Act, 12 Stat. 696, 31 U.S.C. § 231, which imposes a $2,000 fine for "any claim upon or against the Government" submitted by one "knowing such claim to be false, fictitious or fraudulent." If Acme included cost items in its 1954 price-redetermination statement even though it knew them to be false, it is subject to a $2,000 fine. See, *e.g.*, *United States* v. *Fox Lake State Bank*, 225 F. Supp. 723, 724–25 (N.D. Ill., 1963); but see *United States* v. *Park Mo-*

[25] Assuming an implied contractual covenant to maintain accurate accounting records, the defendant has also failed to prove that Acme breached such a warranty. The only reason that plaintiff's accountants could not certify its 1954 cost statement was that the firm had not been present to watch the taking of a physical inventory. The accountants' refusal to certify Acme's statement of costs had nothing to do with any inaccuracy or impropriety of the contractor's records. *Cf. Little* v. *United States*, 138 Ct. Cl. 778 (1957).

tors, Inc., 107 F. Supp. 168, 174–77 (E.D. Tenn., 1952).[26] Although Acme could not be certain that expenses such as the salaries paid to Tucker were not reimbursable, it could have had no similar doubts regarding the personal services rendered by Acme employees on Norris' farm. This matter was brought directly to the attention of Acme officials by the Federal Bureau of Investigation, but plaintiff failed to remove Norris' personal expenditures from the charges claimed on Contract 1213. Finding 26. This $1,045 charge was subsequently included as a cost component in Acme's April 1954 request for the contract ceiling price. In that manner, plaintiff knowingly submitted a false claim and is subject to a fine of $2,000.

The Government maintains that inclusion of the same items in the claims submitted by Acme in 1958 and 1961 justifies the imposition of two more civil penalties of $2,000 each. But Norris' farming expenditures were not included in the 1961 statement, and it is difficult to imagine that plaintiff even recalled this item when it submitted the 1958 termination-cost proposal. Moreover, we are not dealing with different expenditures; the subsequent claims contained the same costs which the Government had previously challenged. The present case is unlike those in which numerous vouchers are submitted to the Government, and each contains a separate and distinct false claim for which the fine may be validly imposed. *E.g.*, *United States* v. *Ueber*, 299 F. 2d 310, 313 (C.A. 6, 1962); *United States* v. *National Wholesalers*, 236 F. 2d 944, 950 (C.A. 9, 1956), *cert. denied*, 353 U.S. 930 (1957). We are faced, rather, with one false claim, which was denied by the Government and thereafter reasserted by the plaintiff. The court holds that the defendant cannot recover more than once for the very same false claim; it is therefore entitled only to $2,000 by way of counter-claim.

In sum, we conclude that none of the legal defenses which the Government has asserted justifies its cancellation of the contract in the summer of 1954 for the alleged fault of the

---

[26] The *Park Motors* case held that the clause of the False Claims Act with which we are concerned requires a finding of specific intent to defraud. But the language of the statute discloses no such element. Since "proceedings [under the False Claims Act] are remedial and impose a civil [rather than a criminal] sanction," (*United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549 (1943)), we see no justification for adding a requirement that specific intent to defraud be proved.

contractor. When the Government is displeased with the contractor's administration of an agreement, it may always sever contractual relations under the standard termination-for-convenience clause inserted in its contracts. *John Reiner & Co.* v. *United States*, Ct. Cl. No. 431–57, decided Dec. 13, 1963, 325 F. 2d 438, *cert. denied*, 377 U.S. 931 (1964). But if the United States seeks instead to annul a contract for fault, thereby leaving the contractor wholly uncompensated, it must have proper justification for such harsh consequences. *Klein* v. *United States*, 152 Ct. Cl. 8, 285 F. 2d 778 (1961); *Nesbitt* v. *United States*, Ct. Cl., No. 321–61, decided May 14, 1965, fn. 2.

II. PLAINTIFF'S DAMAGES

A. GENERAL STANDARD

Having rejected each of the absolute defenses urged by the Government, we must determine the appropriate measure of damages incurred as a result of the improper cancellation. The position advanced by the defendant, and accepted by the Trial Commissioner, is that plaintiff is entitled only to the traditional remedy of damages given by this court for breach of an express contract. The purpose of that remedy is to place the party against which the breach has been committed in the position it would have held if the contract had been fully performed. Acme had suffered large losses in the performance of Contract 1213 at the time it was wrongly canceled by the defendant. According to projections, however, Acme would have been able to reduce its losses considerably had it been permitted to complete the contract. The Trial Commissioner therefore determined that plaintiff was entitled to recover any post-cancellation costs incurred as a result of the Government's erroneous action, plus the amount by which it would have been able to decrease its losses through completion of the contract. In this way, the Commissioner reasoned, Acme would be given the same benefits it would have received had it been permitted to carry out the agreement.

Plaintiff's main argument is that it is entitled to restitution as an alternative remedy. Under that standard of relief, a party whose contract has been repudiated or otherwise breached may, if he meets certain conditions, recover the

reasonable value of his services, measured as of the time of performance. The purpose is to restore the injured party to the pre-contract *status quo*, not to put him in his post-contract position. Restitution has long been recognized by the commentators as one of three possible remedies for the substantial breach of an express contract, the others being damages and specific performance. See Restatement, Contracts §§ 347–57; 5 Corbin, *Contracts* §§ 1102–21 (1951); 5 Williston, *Contracts* §§ 1454–85 (rev. ed. 1937). The Restatement contains a full discussion of restitution in its chapter entitled "Judicial Remedies for Breach of Contract." Corbin states explicitly, "In the present chapter we are dealing with restitution as a remedy for breach of contract; a judgment for such restitution is as truly a remedy for a 'breach' as is a judgment for damages." 5 Corbin, *Contracts* § 1104 (1951). The applicability of restitution as an alternative remedy for breach is also well-established in both the federal and the state courts. *E.g.*, *Michael Del Balso, Inc.* v. *Carozza*, 136 F. 2d 280 (C.A.D.C., 1943); *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F. 2d 606, 610 (C.A. 2, 1944); *Southern Painting Co.* v. *United States ex rel. Silver*, 222 F. 2d 431, 433–34 (C.A. 10, 1955); *Valente* v. *Weinberg*, 80 Conn. 134, 67 Atl. 369 (1907); *Pelletier* v. *Masse*, 49 R.I. 408, 143 Atl. 609 (1928).[27]

Although the Court of Claims has permitted *quantum meruit* recovery for contracts implied in fact (see, *e.g.*, *New York Mail & Newspaper Transp. Co.* v. *United States*, 139 Ct. Cl. 751, 759, 154 F. Supp. 271, 276, *cert. denied*, 355 U.S. 904 (1957)), no past contractor has successfully sought restitutionary relief for breach of an express contract. But unless this form of recovery is precluded by our general jurisdictional statute, 28 U.S.C. § 1491, we must be guided by the principal that, "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry* v. *United States*, 294 U.S. 330, 352 (1935). See, also, *New York Mail & Transp.*

[27] *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, *supra*, 146 F. 2d at 610, a leading case in this area, involved unit prices in a construction contract, and the defendant contends that recovery on the basis of restitution must be limited to cases of that nature. But neither *Zara* nor any of the other cases or commentaries intimate the existence of such a restriction.

Co. v. *United States*, *supra*, 139 Ct. Cl. at 759, 154 F. Supp. at 276; *Refining Associates, Inc.* v. *United States*, 124 Ct. Cl. 115, 120, 109 F. Supp. 259, 261 (1953). Since contracts with the United States are to be governed by the same principles as "those between man and man" (*Gilbert* v. *United States*, 1 Ct. Cl. 28, 37 (1863), *aff'd*, 75 U.S. (8 Wall.) 358 (1869), and see *Padbloc Co.* v. *United States*, 161 Ct. Cl. 369, 377 (1963)), we are obliged to award restitution to a petitioner meeting the prescribed qualifications, unless there is some jurisdictional impediment.

The Tucker Act empowers this court "to render judgment upon any claim against the United States founded * * * upon any express or implied contract with the United States * * *." 28 U.S.C. § 1491. Although this precludes recovery on the basis of a contract merely implied in law (see *Sutton* v. *United States*, 256 U.S. 575, 581 (1921)), the plaintiff seeks restitution for breach of an *express* contract, which clearly comes within the ambit of the Act. The cases cited by the Trial Commissioner simply denied "quantum meruit" (*i.e.* restitutionary) recovery for the alleged breach of an express contract where the court determined that no breach had in fact taken place. See *Lacchi Constr. Co.* v. *United States*, 102 Ct. Cl. 324, 355–56 (1944); *Frazier-Davis Constr. Co.* v. *United States*, 100 Ct. Cl. 120, 161–62 (1943); *Steel Products Eng'r Co.* v. *United States*, 78 Ct. Cl. 410, 418 (1933).[28]

The Government says that, even if restitution is an available remedy, Acme has not met the conditions necessary for recovery on that basis. The accepted rule is that,

> If the performance that the contract required of the plaintiff has been wholly prevented, and if the result of his labor and expenditure still belongs to him, he has no remedy by way of restitution. If the performance required was the production and delivery of a finished article, and the defendant wrongfully prevents completion and delivery of the article, the plaintiff cannot get judgment for the reasonable value of his work and labor

[28] These cases contain broad statements to the effect that "*quantum meruit* cannot be allowed where there is a valid contract between the parties." *Frazier-Davis Constr. Co.* v. *United States*, *supra*, 100 Ct. Cl. at 162. In each one, however, *quantum meruit* relief appears to have been considered, as an alternative, only after the court found that the contract was *not* breached.

> in preparation to perform, except so far as it may be included in a claim for damages. Such work and labor is not itself requested or received by the defendant.

Restatement, Contracts § 348, Comment "c". Defendant contends that Contract 1213 was for the purchase of (completed) 75 mm. recoilless rifles from plaintiff, and therefore contemplated "the production and delivery of finished article[s]," for the breach of which plaintiff is entitled only to damages. This misconceives the nature of the contract which states, expressly, that Acme is to "*furnish* and deliver" specified items (emphasis added). The entire pre-contract negotiations were based on the assumption that it was Acme which would manufacture the requested rifles. The defendant at first had reservations about plaintiff's ability to perform the contract, but, after investigating Acme's plant and personnel, the Government concluded that Acme and its subcontractors would be capable of carrying out the agreement. Defendant's Exhibit 12. One of the contemplated benefits of awarding the contract to Acme was that "placing this procurement [in] subject contractor's plant will not only broaden the manufacturing base but create a salutary effect, pricewise, on all other procurements of this type." *Ibid.* Thus, the Government contracted not only for a finished product, but also for the manufacture of that product by Acme. When an agreement of this nature is breached, restitution is available.

The next argument is that plaintiff's recovery must be limited to the reasonable value of the goods it actually delivered prior to cancellation. It is clear, however, that restitution is permitted as an alternative remedy for breach of contract in an effort to restore the innocent party to its pre-contract *status quo*, and not to prevent the unjust enrichment of the breaching party. "Judgment will be given for the value of service * * * rendered, even though the product created thereby has been lost or destroyed by the defendant, and *even though there never was any product created by the service that added to the wealth of the defendant.*" Restatement, Contracts § 348, Comment "a" (emphasis added). It is when the plaintiff is the party in default that his recovery may be limited by the amount of the benefit to the defendant.

See *Schwasnick* v. *Blandin*, 65 F. 2d 354, 357 (C.A. 2, 1933). But "if the promisee has performed so far as he has gone, and the promisor breaks his promise, the promisee may abandon the contract and sue for restitution, in which he can recover the reasonable value of his services, measured by what he could have got for them in the market, and not by their benefit to the promisor." *Ibid.* See, also, Restatement, Contracts § 347, Comment "c". Acme's recovery is not limited to the value of the goods received by the Government under the contract; rather, it can be based on the reasonable value of the entire performance.

Acme's position is that the reasonable value of its services is most accurately reflected by the actual costs it incurred in the performance of Contract 1213. As the best means of restoring the *status quo ante*, cost of performance is often used as the basis for determining the amount of *quantum meruit* recovery, in the absence of "any challenging evidence." *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F. 2d 606, 611 (C.A. 2, 1944); see, also, *United States ex rel. Arc & Gas Welder Associates, Inc.* v. *Blount*, 182 F. Supp. 648, 665 (D. Md.), *aff'd*, 285 F. 2d 863 (C.A. 4, 1960), *cert. denied*, 366 U.S. 919 (1961); *United States ex rel. Wander* v. *Brotherton*, 106 F. Supp. 353, 354–55 (S.D.N.Y., 1952). But if the defendant is able to show that the costs incurred by the contractor were excessive (as a result, for example, of inefficiency or extravagance), the amount of recovery is commensurately reduced. *Cf. Barrett Co.* v. *United States*, 273 U.S. 227, 235 (1927); *United States* v. *Behan*, 110 U.S. 338, 345–46 (1884).[29]

---

[29] Relying on *United States* v. *Penn Foundry & Mfg. Co.*, 337 U.S. 198 (1949) and *Chain Belt Co.* v. *United States*, 127 Ct. Cl. 38, 59, 115 F. Supp. 701, 714–15 (1953), the Government claims that Acme is not entitled to restitution on the basis of its costs, because those costs were in no way caused by the defendant's breach. The cited cases treat with the disallowance of lost *profits* as damages when they are too speculative. Since the theory behind restitution is to restore the *status quo ante*, potential profits under the rescinded contract are irrelevant.

It is likewise immaterial that, under a convenience-termination, plaintiff's recovery would be limited by its costs and the ceiling price. The cancellation here was for the contractor's fault, and in such a situation the rule of *John Reiner & Co.* v. *United States*, *supra*, is inapplicable if there was in fact no default. See *Klein* v. *United States*, *supra*; *Goldwasser* v. *United States*, Ct. Cl., No. 477–61, decided Dec. 13, 1963, 325 F. 2d 722; *Litchfield Mfg. Corp.* v. *United States*, Ct. Cl., No. 453–56, decided Oct. 16, 1964, slip op., p. 4, fn. 9, 338 F. 2d 94, 96; *Dale Constr. Co.* v. *United States*, Ct. Cl., No. 134–57, decided Dec. 11, 1964, slip op., p. 26; *Nesbitt* v. *United States*, *supra*.

The record before us is inadequate to determine whether Acme's costs were, in fact, excessive. Plaintiff's expenses appear to be inordinately high even if one takes into account its lack of experience in this manufacturing line and the prospective advantage to the Government of broadening the base of procurement. The contract ceiling price, for instance, was $384.95 per unit, but plaintiff's actual cost in manufacturing the first 446 rifles was $1,179.29, and its cost of production during the last six months of the contract was $690.21. See findings 7, 52(a), (c). Although it is conceivable that these expenditures accurately reflect the value of Acme's services, the present record does not provide enough information for a sufficiently accurate answer. In particular, it would seem important to compare Acme's costs with those of other manufacturers of the same rifles during that period, taking into consideration that Acme should be permitted greater reimbursement than established manufacturers because of its inexperience and the anticipated benefits of its entry as a competitor. Since this issue was not squarely presented at the original trial, the defendant had no real opportunity to prove that plaintiff's costs were inflated; it should be permitted to do so now. We are therefore remanding the case to the Trial Commissioner under Rule 47(c) for a separate determination of liability.

To the extent that Acme's actual costs are used in making this determination, the Commissioner should consider that the amounts which plaintiff paid its subcontractors latently included reimbursements for kickbacks paid to various members of the Tucker organization. See findings 18–25. Although the defendant has not attempted to prove that any of the subcontract prices were inordinately high, the kickbacks involved were hardly ordinary business expenses incurred in manufacturing 75 mm. rifles. If Acme's total costs are to measure the value of its services, they must be reduced by any kickbacks actually paid to the Tucker organization by plaintiff's subcontractors. Nor should Acme be reimbursed for the amounts it paid to Tucker; for the reasons given in the companion case, we conclude that his employment violated the covenant against contingent fees. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538–59,

decided this day.[30] Tucker's salaries cannot be considered reasonable expenses which enhanced the value of Acme's services to the Government. Neither the contingent fee payments nor the kickbacks may be included in the computation of Acme's restitutionary recovery.[31]

B. GOVERNMENT-FURNISHED MACHINERY

Plaintiff urges that a determination of the reasonable value of its contract performance must take into account costs incurred as a result of defective government-furnished machinery. By supplying deficient equipment, it is alleged, the defendant forced Acme to render additional services, which had market value and are compensable under the theory of restitutive recovery. The purportedly defective machinery was, however, furnished under a separate facilities contract, not the main contract. That agreement explicitly disclaimed liability "for damages or loss of profit by reason of any delay in delivery or failure to deliver any or all of the items set forth * * *, or *for delivery of such items not in satisfactory operating condition or not of a suitable type.*" (Emphasis added.) The contract also stipulated, "In the event[government-furnished] items are not in fit operating condition, the Contractor shall repair, restore, or rehabilitate such equipment so as to make it serviceable or fit for use (cost connected with such repairs, restoration, or rehabilitation shall not be reimbursed to the Contractor)." If the provisions concerning government property had been included in the main contract, such a disclaimer or limitation of liability for breach of warranty would possibly have to be disregarded under plaintiff's theory, which fixes the measure of recovery by the value of the services performed, rather than by the terms of the breached contract providing or re-

[30] Acme's misrepresentations to the defendant concerning Tucker's employment form an additional ground in this case for holding that the covenant was breached.

[31] The legal fees incurred by plaintiff in defending suits brought by subcontractors and in submitting its termination claim did not add to the value of its services, and therefore may not be considered in calculating plaintiff's recovery.

The computation of recovery should, however, take into account that, on two occasions, the defendant ordered Acme to suspend further operations until given instructions to continue. See findings 42(b), 47. Any stand-by costs incurred by plaintiff during these periods are compensable, since they added to the value of its performance.

stricting compensation. But the facilities contract was separate and was not materially breached; its clauses limiting liability remain in effect.[22] We must therefore determine whether the plaintiff is correct that the disclaimer clause is less-than-absolute and does not bar recovery for increased costs resulting from defective government machinery.

Plaintiff would have us read this disavowal of liability as applicable only to ordinary repairs made following delivery of the equipment. Because the disclaimer refers to Acme's obligation to repair the machinery in case of "delivery of such items not in operating condition," Acme infers that the cost of extraordinary repairs incurred in the course of performance was to be borne by the defendant. Aside from the practical difficulty of separating "normal" and "extraordinary" expenses, there is a more basic objection. The terms of the disclaimer are broad, and refer to Acme's duty to repair items "not in operating condition," without imposing any limitation as to the time when the equipment becomes inoperable or the amount of work required to fix it. There is no reason to qualify or limit the general sweep of the contract words.

On the other hand, along with the disclaimer, the facilities agreement also specified that, if the equipment supplied by the Government required repair as a result of defects present at the time of delivery, the "Contracting Officer, upon written request of the Contractor, may equitably adjust the price, the time of performance, and other terms and conditions of the affected supply contract(s). * * * Any failure by the parties hereto to agree upon such equitable adjustment shall be determined in accordance with the article of the related supply contract(s) entitled 'Disputes'." See finding 35. We do not interpret these provisions as inconsistent with the explicit disavowal of liability. Instead, they specify the only form in which relief can be obtained for injuries resulting from substandard machinery furnished by the defendant; unless the contractor makes timely written request for an equitable adjustment, he must, according to the disclaimer, bear all costs of resulting delays and re-

[22] Although the main contract also contained a government-furnished property clause, it was superseded by the more extensive provisions of the separate facilities agreement.

pairs. See, generally, Goodwin, *Government-Furnished Property*, Government Contracts Monograph No. 6, p. 17 (1963); Paul, *United States Government Contracts and Subcontracts* 267 et seq. (1964).[33]

During the course of contract performance, Acme made at least two written requests for reimbursement of costs incurred as a result of defects in equipment supplied by the defendant. See finding 39(b)(2), (6). About one week after cancellation, on August 26, 1954, the plaintiff filed a claim with the Philadelphia Ordnance District, asking to be repaid for all parts which it purchased to make the defendant's machinery workable. Finding 44(a). This August 1954 request is challenged by the defendant as untimely. Considering all the circumstances, we cannot agree. The machinery was supplied to plaintiff throughout 1953; although some performed reasonably well, other pieces required constant tinkering and broke down repeatedly, disrupting the smooth flow of production. See findings 39(b), 43(c). At least as late as May 1954, flaws in the government machinery were still being encountered (see finding 39(b)(11)), and, if past experience is the guide, such difficulties were probably prevalent until the suspension of contract performance a little over a month later. Had plaintiff been required to ask for an equitable adjustment each time a minor defect was discovered, the result would have been a continuous flow of such requests to the contracting officer. The time and effort expended by both parties in effecting numerous equitable adjustments would have been excessive. Instead, Acme apprised the defendant of the various difficulties at approximately the time they were encountered, but, with several minor exceptions, it in effect waited until after the abrupt termination of the contract to make a single request for compensation. This was un-

[33] See, also, *B.H. Sales, Inc.* v. *United States*, Ct. Cl., No. 75–61, decided Jan. 22, 1965, 340 F. 2d 358; *Topkis Bros.* v. *United States*, 155 Ct. Cl. 648, 297 F. 2d 536 (1961), *rehearing denied*, 155 Ct. Cl. 680, 299 F. 2d 952 (1962). In *Ekco Products Co.* v. *United States*, Ct. Cl., No. 464–57, decided Jan. 11, 1963, 312 F. 2d 768, plaintiff was permitted to recover breach-of-contract damages for costs resulting from defective government-furnished property. In that case, the contract contained no disclaimer, and a warranty of fitness could reasonably be implied from the contractual provisions. See slip op. pp. 5–6, 17–18, 312 F. 2d at 771.

doubtedly the most efficient manner of obtaining relief. Plaintiff's cumulative demand for reimbursement in August 1954, as well as the two requests made prior to annulment of the contract, were timely.

Plaintiff's letters sought reimbursement for repair costs, without specifically invoking the equitable adjustment provision of the facilities contract or the Disputes article of the supply contract. But the letters were easily understandable, and the failure to delineate the precise clauses permitting recovery should not stand as a bar. *Cf. Specialty Assembling & Packing Co.* v. *United States*, 156 Ct. Cl. 252, 254–55, 298 F. 2d 794, 796 (1962). To the extent that the trial commissioner finds that these timely claims for reimbursement reflect actual costs incurred by the contractor because of defective government equipment—rather than its own inexperience or inefficiency—the plaintiff is entitled to an equitable adjustment as provided in the facilities contract. This equitable adjustment should be added to the determination of the value of the rest of plaintiff's performance.[34]

III. LIQUIDATED DAMAGES

Throughout the contract plaintiff was behind in its deliveries. The original schedule was substantially revised in supplemental agreements executed in August 1953 and January 1954. Despite these time extensions, plaintiff was still late in deliveries at the time of the suspension of its contract in July 1954, and was assessed liquidated damages pursuant to the contract clause. On that basis, $53,715.19 was withheld from payments otherwise due. Claiming that the liquidated damages provision was erroneously invoked, Acme asserts that it is entitled to reimbursement of the entire amount.

There is a question whether plaintiff is barred from making this claim because it did not request a decision of the contracting officer on the cause of its tardy deliveries. In Contract 1213, the clause dealing with liquidated damages contains a paragraph excusing the contractor from

[34] Since no administrative proceedings were held on any item of damage including this one, it may be assessed, together with the other elements of recovery, under our Rule 47(c). See *Stein Bros. Mfg. Co.* v. *United States*, *supra*, Ct. Cl., No. 389–59, decided July 12, 1963, 327 F. 2d 861.

paying liquidated damages when the delay arises out of causes beyond his control and without his fault or negligence. It says that in such cases, subject to the Disputes clause, "the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance when in his judgment the findings of fact justify an extension." The Disputes clause says simply that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer * * *."[35] It cannot be said that these provisions, taken together, required the contractor to make a specific request to the contracting officer for a determination of the reasons for the delays. So long as the contracting officer was put on notice that the plaintiff wanted to avoid the levy of liquidated damages, the minimum demands of the contract would be met.

This is precisely the effect of a letter sent on May 20, 1954, by plaintiff to the Comptroller General via Philadelphia Ordnance District. The contracting officer refused to forward the letter as requested, because he felt that the appeal was addressed to equitable rather than legal considerations and would not be cognizable by the Comptroller General. After being told of the contracting officer's action, Acme wrote another letter to him on June 21, 1954, explicitly reaffirming the prior request and "asking relief from our Liquidated Damages Clause at the *District* level" (emphasis added). This notification was quite different from the "mere ambiguous requests for adjustments or possible negotiations" which were deemed insufficient in *Specialty Assembling & Packing Co.* v. *United States*, *supra*, 156 Ct. Cl. at 255, 298 F. 2d at 796. Acme's letters put the defendant on notice both as to the relief requested and the contract clause on which the request was based; furthermore, in its June 21st letter, plaintiff invited a ruling by the contracting officer. It is clear that plaintiff was in effect asking for an equitable adjustment; the need for a degree of precision, as suggested

[35] The defendant also relies on provisions of the facilities contract which make no mention of liquidated damages, but which require plaintiff to make a written request for an equitable adjustment in the time of performance, if the government-furnished machinery is defective. Assuming that these provisions are applicable to liquidated damages, we think that plaintiff's letters of May 20 and June 21, 1954 (see *infra*) satisfied this requirement.

in *Specialty Assembling*, was met. When the defendant suspended all production on July 22, 1954, and completely canceled the contract a month later, the contracting officer had taken no action on Acme's demand for remission of liquidated damages; the annulment of the agreement destroyed the administrative appeal mechanism created by the contract. Since Acme properly sought to invoke its administrative remedies as long as they were available, the Government's defense of failure to exhaust must be rejected.

Having surmounted this procedural defense, plaintiff is entitled to recover on its claim for remission of liquidated damages, because the delays on which the assessment was based were caused by the Government as well as by Acme. On the one hand, the plaintiff's difficulties in operating the government machinery were partially attributable to the inexperience and incompetence of its own personnel. On the other, defects in some of the equipment furnished by the defendant resulted in repeated failures and breakdowns. While some of the machines performed reasonably well if properly operated, the smooth flow of production was rendered impossible when other machines essential to a sequence of operations were in disrepair. See finding 43. "[W]here delays are caused by both parties to the contract the court will not attempt to apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled." *Schmoll* v. *United States*, 91 Ct. Cl. 1, 28 (1940). See, also, *United States* v. *United Eng'r & Contracting Co.*, 234 U.S. 236, 242 (1914); *Vogt Bros. Mfg. Co.* v. *United States*, 160 Ct. Cl. 687, 709 (1963); *Commerce Int'l Co.* v. *United States*, Ct. Cl., No. 287–55, decided Oct. 16, 1964, slip op., p. 12, 338 F. 2d 81, 90. That result is fair. It does not deprive the Government of an opportunity to prove and recover its actual damages caused by the contractor's delay[36]; instead, the defendant merely loses its right to insist on an artificial measure of damages

[36] Since the Army had decided to discontinue the use of 75 mm. rifles at the time Acme's contract was canceled, proof of actual damages would be virtually impossible.

agreed on by the parties for the situation in which the contractor alone is responsible for the delay.[37]

IV. SUBCONTRACTORS' RIGHT TO RELIEF

Along with its own claim, Acme has brought suit on behalf of a number of firms to which it sublet portions of the prime contract. The three major subcontract claims are those of All Metals Industries, Manalapan Machine Works, and Foley Machine Company. Each of these subcontractors obtained orders from Acme through the payment of kickbacks to Harry K. Tucker, Jr.[38] See findings 18–23. At the time the kickbacks were given, All Metals knew of Tucker's double agency, and the other two subcontractors either knew or should have known of it. On the other hand, Acme was unaware of Tucker's duplicity.

When a contract is obtained by a person secretly acting as a dual agent, and one party knew or should have known of the double employment, only the innocent party has the option of either affirming or avoiding the agreement.[39] Affirmance is not effective as ratification until after the innocent party obtains full knowledge of the material facts concerning the fraudulent procurement. See Restatement, Agency 2d, §§ 91, 313. In the present case, it was not until well after cancellation of its prime contract that Acme, the innocent party, learned of the kickback arrangements. See *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538–59, decided this day, fn. 20. Prior to that time, it did not have the requisite knowledge to effect ratification.

When its prime contract was canceled by the Government, Acme responded by immediately requesting all its subcontrac-

---

[37] Since the issue of liquidated damages has been resolved in Acme's favor, it is unnecessary to pass on the broad contention advanced by plaintiff that, when the contractor is given restitutionary recovery, the contract is effectively wiped out, and the Government automatically loses any rights it may have had under the liquidated damages clause.

[38] Foley's payments were actually made to Neptune Manufacturing Company, a dummy corporation formed by Tucker and Norris to carry out their kickback activities. When it paid the kickbacks, Foley knew of Tucker's relationship to Neptune. Tr. 657–58.

[39] The rule that a party knowing of the double agency may not disavow the contract is traditionally stated in terms of actual knowledge. In the present case, both Foley and Manalapan denied having such knowledge. Tr. 668, 682. Judging from the circumstances, however, these two subcontractors were hardly innocent parties and, at the very least, can plainly be saddled with constructive knowledge.

tors to halt performance. From that time forward, the plaintiff had nothing to gain by ratification of its voidable subcontracts. Yet long after conclusion of performance, Acme has nonetheless chosen to "ratify" these agreements. The reason is not difficult to discern: Only if Acme is liable to the subcontractors, may Acme recover from the defendant in their behalf. See *J. L. Simmons Co.* v. *United States*, 158 Ct. Cl. 393, 304 F. 2d 886 (1962). Acme was apparently willing to affirm the agreements on the theory that the Government would probably bear any resulting liability.[40] As is pointed out in the discussion of All Metals' claim in the companion case, No. 538–59, this form of after-the-fact ratification cannot be accepted since it violates the rule that "affirmance is * * * inoperative as ratification * * * as against persons who in the meantime have acquired interests with which it would be unjust to interfere." 2 Williston, *Contracts* § 278A n.1 (3d ed. 1959).[41] See, also, Restatement, Agency 2d, § 101(c). Had Acme acted reasonably, avoiding these subcontracts after it found out about the improper double agency, the Government would not be liable. This freedom from liability is an "interest with which it would be unjust to interfere." Acme's attempt to destroy that interest by post-cancellation ratification of the moribund subcontracts is unavailing.

It is still necessary to determine whether the Government would be liable to All Metals, Manalapan, and Foley, if Acme had in fact avoided these subcontracts, as we have held it was bound to do. Before a contract may be rescinded because of its fraudulent procurement by one of the parties, to prevent unjust enrichment, the defrauded party is generally required to return the goods it received under the contract, or their reasonable value. See Restatement, Restitution §§ 65, 66. Since these three subcontractors would have been entitled to the reasonable value of the goods they ac-

---

[40] The agreements with both All Metals and Manalapan specifically provided that, if the defendant terminated the prime contract, Acme would be liable to the subcontractor only to the extent the latter's claims were allowed and paid by the United States. See finding 64(b), (c). With regard to these two claimants, if Acme's purported ratification were allowed to stand, its effect would be to make the defendant exclusively liable.

[41] Since this principle is determinative for the present, we need not at this stage consider the Government's defense based on the "Severin" doctrine. See *Severin* v. *United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944).

tually delivered, the defendant should in turn be liable to that extent.[42] *Cf. Crocker* v. *United States*, 240 U.S. 74, 81–82 (1916). In the future proceeding before the Commissioner, if plaintiff is able to prove that the value of the items delivered by any of the three subcontractors exceeded the total amount it was paid, then recovery on behalf of that subcontractor will be permitted—unless the "Severin" doctrine is a bar (see footnote 41, *supra*).

With respect to the claims of the remaining subcontractors, there has thus far been inadequate proof of damages. Although the defendant audited the accounting records of each one, such verification is no substitute for actual evidence of injury. See *River Constr. Corp.* v. *United States*, 159 Ct. Cl. 254, 271 (1962). When this question arose during the trial, plaintiff's counsel acknowledged that further proof was required, explaining that, although the other subcontractors had been invited to submit more detailed claims, they had failed to so so. Tr. 1396–97. These claims being unproved, they cannot be accepted at the present time. Plaintiff, however, may present further proof, if it can, in the proceedings under Rule 47(c).

V. INTEREST

The last matter is the plaintiff's demand for interest from January 1, 1955, on those parts of its overall claim for damages represented by (1) the improper assessment of liquidated damages by the defendant, (2) the withholding of amounts due under the price redetermination provision of the contract, and (3) the failure to pay the equitable adjustment requested in August 1954 for repairs of government-furnished machinery. These amounts, the plaintiff says, were retained by the defendant without any color of right and thus come within the circle of the Fifth Amendment's guarantee that property shall not be taken for public use without payment of just compensation. This type

[42] This measure of damages is of course far less than that which Acme itself is receiving, since it is recovering the reasonable value of *all* its services, whether they resulted in actual deliveries to the United States or not. To the extent that the three subcontractors incurred expenses on unfinished or undelivered goods, they may not recover. This disparity is only fair, since Acme is recovering on a contract breached by the United States, while each subcontractor's agreement must be treated as rescinded because it was fraudulently procured from Acme.

of demand is not novel in suits on government contracts; nor is its steadfast repudiation by the courts. See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658–59 (1947); *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 335–36 (1920); *Komatsu Mfg. Co.* v. *United States*, 132 Ct. Cl. 314, 131 F. Supp. 949 (1955); *Ramsey* v. *United States*, 121 Ct. Cl. 426, 430–33, 101 F. Supp. 353, 355–57 (1951).

Plaintiff concedes that, under the case law, unless the Government acted in bad faith when it withheld the funds in dispute, there could be no violation of the Fifth Amendment, and recovery of interest on the basis of the contract would be prohibited by 28 U.S.C. § 2516(a), permitting this court to allow interest on a claim "only under a contract or Act of Congress expressly providing for payment thereof." To show bad faith, the plaintiff stresses a determination by the Department of Justice in December 1954 that it would bring no civil or criminal action against Acme. But, plainly, this was not tantamount to a finding of bad faith on the part of the Army; a difference of opinion is not proof of malice. The plaintiff also alleges that, at the time of cancellation, the Government did not have proof that plaintiff was guilty of fraudulent acts which would justify annulment; that the Government knew that its proposed action might force plaintiff into bankruptcy; and that the real cause of the cancellation was the defendant's decision to discontinue production of 75 mm. recoilless rifles because they were obsolete. At the trial of this case, an Ordnance attorney who advised that Contract 1213 be rescinded testified that, at the time, he deemed this action appropriate because he thought plaintiff had violated the covenant against contingent fees, as well as the anti-kickback and false claims statutes. Tr. 1024–25. Assessing the credibility of this witness and the others who testified as to the matter, the Trial Commissioner concluded that the defendant canceled the contract for two equally potent reasons: the termination of military requirements for the 75 mm. rifles *and* the contractual irregularities thought to be present. Finding 50(a). The circumstantial evidence submitted by plaintiff to overcome the presumption of correctness attaching to the Com-

missioner's finding is wholly inadequate for that purpose. *Cf. Commerce Int'l Co.* v. *United States*, Ct. Cl., No. 287–55, decided Oct. 16, 1964, slip op., pp. 6–7, 338 F. 2d 81, 86; *Davis* v. *United States*, Ct. Cl., No. 179–59, decided Feb. 14, 1964, slip op., pp. 4–5. We must therefore turn aside Acme's argument that the Government acted in bad faith.

Our conclusion is sustained by an examination of the specific claims which, according to plaintiff, were rejected in bad faith. The Government withheld liquidated damages, thinking that the contract gave it the right to take such action. The court's determination that liquidated damages were not properly assessable in no way negates the existence of a bona fide dispute involving difficult legal issues. Similarly, so far as can be ascertained, the defendant had almost concluded at the time of the contract annulment that the plaintiff would be entitled to the ceiling price under the redetermination clause. But it withheld this amount, along with other entitlements, because of an honest belief that plaintiff's conduct merited forfeiture. Although the defendant erred in believing that it could annul Acme's contract for violation of such provisions as the covenant against contingent fees, it cannot be charged with bad faith. Finally, the Government's failure to allow an equitable adjustment for expenses incurred in repairing machinery furnished under the facilities contract is attributable to its view that the disclaimer provision was absolute. In none of these instances was the defendant's action without some color of right. Even though a court may determine eleven years later that the Government's premises were faulty, that does not alter the bona fide character of its original actions under the contract or convert the erroneous cancellation of the contract into a taking.[43]

[43] We do not reach the issue of whether there would be a taking (for which just compensation should be paid) if bad faith on the part of the defendant had been shown. In addition, we point out that the statute of limitations bars recovery by the plaintiff on this ground. Acme first alleged a Fifth Amendment taking in an amendment to its petition, filed in September 1961. Since the amendment stated a new cause of action, it had to be filed within six years after the claim accrued. See *Dawnic Steamship Corp.* v. *United States*, 90 Ct. Cl. 537, 580 (1940). But all events fixing the defendant's liability for the alleged taking had occurred on or before January 1, 1955. Plaintiff's claim having accrued by that date, it is barred by the six-year statute of limitations. The fact that settlement negotiations continued thereafter is irrelevant. See, *e.g.*, *Cuban Truck & Equipment Co.* v. *United States*, Ct. Cl. No. 245–57, decided June 12, 1964, slip op., pp. 5, 6–8, 333 F. 2d 873, 877–79; *Empire Institute of Tailoring, Inc.* v. *United States*, 142 Ct. Cl. 165, 168, 161 F. Supp. 409, 411 (1958).

VI. SUMMARY

The case is remanded to the Trial Commissioner for a determination, under Rule 47(c), of the defendant's liability to Acme, based on (a) the reasonable value of its performance under Contract 1213; and (b) an equitable adjustment for the amounts expended under the facilities contract for repair of defective government machinery, for which timely requests were filed. The total thus arrived at should be reduced by defendant's undisputed counterclaim for $15,898 (see finding 60), and by $2,000, based on plaintiff's violation of the False Claims Act. Plaintiff has permission, in proceedings under Rule 47(c), to present further proof on the claims on behalf of all subcontractors other than All Metals, Foley, and Manalapan; in the absence of sufficient proof, those claims will be dismissed. The claims on behalf of All Metals, Foley, and Manalapan are remanded to the Commissioner for a determination under Rule 47(c) of the extent of liability for delivered items, if there is any such liability.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes findings of fact as follows:

1. *Plaintiff's corporate identity and control.* Acme Process Equipment Company (formerly Acme Coppersmithing and Machine Company) is a Pennsylvania corporation located at Oreland, Pennsylvania. At relevant times all of its voting stock was owned jointly by its president and vice president, Joshua Epstein and Samuel Fisher, respectively, who also had controlling interest in the National Molasses Company, a separate corporation. They and their children and relations (including sons Irving and Jack Epstein) owned all of the non-voting stock of plaintiff company and served as its officers.

2. *Acme's line of business.* Until the latter part of 1952 Acme's business consisted principally in the manufacture of processing tanks, boilers, containers, etc., for the distillery, brewery and sugar industries. In 1952 it became interested in obtaining Government contracts in order to offset unevenness in its commercial business, but had no one on the com-

pany payroll with background and experience in the field of Government procurement.

PROCUREMENT OF CONTRACT 1213—CONTINGENT FEE PROBLEM

3. *Entry of Norris and Tucker, Jr.* Unknown to plaintiff, the Government had put under surveillance the activities of a group known as Harry K. Tucker Associates, comprising Harry K. Tucker, Sr., and his son, Harry K. Tucker, Jr., in connection with suspected statutory violations in their contingent fee arrangements for services rendered contractors in procuring Government supply contracts. (Hereafter, use of the name "Tucker" shall denote Tucker, Jr., unless the contrary is indicated.) James S. Norris, who had been general manager of an eventually defunct machine shop, met Tucker in September 1952 and they decided to pool their talents in a company which would render "sales and engineering" assistance to clients of Tucker. In late September or early October 1952 Norris met for the first time with Sidney Cohen, Secretary-Treasurer of the plaintiff company, to ascertain plaintiff's interest in bidding on the manufacture of some apparatus. In this meeting Cohen was asked if he would be interested in engaging a salesman to secure commercial and Government production contracts. In consequence Tucker visited Cohen several times and there were negotiations for his services and those of Norris. It was decided at the instigation of Norris and Tucker that Acme would set up a separate division to handle Government contracts in the metals field, that Norris would manage the operation, and Tucker would contribute his "know-how" in procuring and administering Government contracts and in expediting subcontract operations. Plaintiff's officers had not known Tucker prior to these events; however, plaintiff failed to ascertain who Tucker's other clients were or to ask them about the quality of his services.

4. *Informal hiring of Norris and Tucker.* At this stage the plaintiff informally agreed to hire Tucker and Norris. Tucker was to be paid 3 percent commission—to be divided equally between Tucker and Norris—on all business he procured, with a minimum salary guarantee against which his commissions would be applied. Tucker and Norris were to manage the plaintiff's proposed new division. Norris began

work at the Acme plant in Oreland, initially on an unpaid test basis, and his first duties were to estimate the bids, etc., in response to invitations which Tucker would procure for the plaintiff.

5. *Tucker's employment contract.* Plaintiff entered into a one-year employment contract with Tucker, dated October 13, 1952, whereby he and/or his "organization" agreed to serve as a "bona fide sales agent" on a parttime basis and be paid initially a weekly minimum salary of $150 which, starting 45 days after the initial delivery date in contracts procured by him for Acme, would be increased to equal the sum of (1) 5 percent of weekly gross sales up to $10,000 generated by him and (2) 3 percent of weekly gross sales in excess of $10,000. Minimum salaries paid prior to any sales being made were to be deducted later from the excesses of his commissions over his minimum weekly guarantee. The net effect of the arrangement was that the guaranteed weekly salary was an advance against commissions, and Acme could cancel the contract if commissions did not cover the minimum salary guarantee. The contract defined Tucker's services to include solicitation of invitations from both commercial firms and the Government. Tucker represented in the contract that he had no special connections of any kind with any Government departments. He agreed to assist in preparing price breakdowns and in planning of shop production methods, as well as in the collection of invoices if requested, in obtaining contract financing, and in locating materials, although the contract stated explicitly that it could not be canceled for failure to perform any of these duties not involving solicitation. The contract specifically provided that Tucker represented and would continue to represent other persons and firms having dissimilar lines of business. Norris and Tucker also entered into an agreement with each other that Tucker would pay Norris 50 percent of any money to be paid Tucker by his clients for procuring work for them from Acme.

6. *Tucker's early services.* After the hiring of Tucker plaintiff experienced a pronounced increase in inquiries, bid proposals and bid invitations from both commercial and Government sources, thus increasing Cohen's confidence in his judgment in hiring Tucker. Tucker's services the first few months included investigations to determine prior bid

prices, solicitation of bid invitations, securing quotations from subcontractors, locating applicable specifications, and liaison work with the Philadelphia Ordnance District (hereafter POD).

7. *Plaintiff's bid.* On October 17, 1952, Tucker submitted to plaintiff information concerning the subject contract to be awarded by the Army Ordnance Corps for 2,322 75 mm. recoilless rifles, M–20. Tucker assisted in the preparation of plaintiff's bid estimate. Acting on Tucker's advice that a bid of $350 per rifle would probably insure an award as low bidder, Acme submitted its bid (signed by Norris) to POD on October 23, 1952, at a unit target price of $337.31 per rifle (later corrected to $337.23), subject to upward or downward price revision, with a ceiling price of $365.41 (later corrected to $384.95). Deliveries were proposed starting in March 1953 and finishing January 1954. Two other bidders in that district submitted bids at unit prices of $484.05 and $930.16, respectively. Two other bidders from outside the district submitted bids at unit prices of $423 and $684, respectively, one of them (Firestone) being an experienced manufacturer of the 75 mm. rifle which was then producing them at a contract unit price of $452.60. Plaintiff was thus considered to be the low bidder, although its bid on accessories under the invitation was not as low as one of the other bidders.

8. *Representations as to contingent fees.*

(a) In its original bid dated October 23, 1952, for Contract 1213 Acme, under the certification of James S. Norris as General Manager of the Defense Work Department, answered in the negative that part of the form requiring the contractor to represent whether it has or has not (boxes were supplied against each of the alternatives for inserting a mark to denote the correct fact) "employed or retained a company or person (other than a full time employee) to solicit or secure this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer." Under a revised proposal of December 10, 1952, also signed by Norris, it was instead represented that Acme "has * * * employed or retained a company or person (other than a full-time employee), to solicit or secure this contract and agrees to furnish information relating thereto as requested by the Contracting

Officer." However, under date of December 18, 1952, Joshua Epstein, president of Acme, executed a Government form entitled "Contractor's Statement of Contingent or Other Fees", in which he reverted to the company's position on October 23 by filling in one of the two alternative boxes to indicate that Acme "has not employed or retained a company or person (other than a full-time employee) to solicit or secure this proposed Contract No. —— and agrees to furnish information relating thereto as requested by the Contracting Officer."

(b) Within a roughly contemporaneous period (November 4, 1952 to January 5, 1953), plaintiff submitted bids on three other Army Ordnance contract invitations to the Rock Island Arsenal, and in these bids it disclosed the fact that it had retained someone other than a full-time employee working solely for the plaintiff. On or about December 12, 1952, plaintiff furnished the Rock Island Arsenal with a form 119 (Contractor's Statement of Contingent or Other Fees), to which was attached a copy of its October 13, 1952 employment contract with Tucker; the submitted contract did not, however, disclose the fee-splitting arrangement made by Tucker and Norris. Rock Island Arsenal was thus on notice of the Tucker employment on a part-time basis. There is no evidence that POD had any more than imputed knowledge of it, since it administered the contract to which the form 119 related (see next paragraph). The disclosure provided the Office of the Chief of Ordnance in Washington with its first indication that Acme had an employment relation with Tucker whose 5 percent activities had excited official interest for some time past.

(c) One of the plaintiff's three bids referred to in the preceding paragraph ripened into the award to Acme on January 7, 1953, of Contract No. DA–11–070–ORD–8580 (hereafter referred to as Contract 8580), which was executed by the Rock Island Arsenal but was administered by POD. Contract 8580 is the subject of another pending action by the plaintiff in this court in Court of Claims No. 538–59. It bears the plaintiff's statement that it "has employed or retained a company or person (other than a full-time employee) (working solely for the bidder) to solicit or secure this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer."

(d) Prior to award of the contract in suit to plaintiff, Army Ordnance headquarters had information relative to the contingent fee activities of the Tucker father and son team, but to what extent this information was in the possession of POD personnel who were negotiating with plaintiff is not known. Certain POD personnel apparently had some information concerning Tucker, Sr., because they advised plaintiff of its possible mistake in employing the son of a man suspected of so-called "five-percenter" activities, but plaintiff had no other factual basis for imputing the father's delinquencies to the son and so ignored the advice. At the request of one of the POD negotiators the plaintiff submitted a certification, dated December 18, 1952, that it "has not employed or retained a company or person (other than a full-time employee) to solicit or secure this proposed contract * * *".

(e) Under date of May 8, 1953, in response to defendant's request for a proposal for an additional quantity under the contract in suit, the plaintiff signed a warranty that it "has not" retained anyone, etc.

(f) On May 18, 1953, Acme advised POD by letter as follows:

> In answer to the question that has arisen about the status of our Mr. Harry K. Tucker, Jr. please be advised that as of January 1953 Mr. Tucker has gone on a full time basis with this company, acting in the capacity of Sales Manager.
>
> The original part-time salary employment contract with Mr. Tucker was cancelled, and any commissions or percentages due him under this original agreement were also cancelled. He is not now, or has in the past collected any commissions on any prime contract or sub-contract, or commercial work that he has obtained for us in the past or in the future.
>
> We will appreciate your notifying Rock Island Arsenal and withdrawing a Form W119 which was filled out by Acme showing that Mr. Tucker was being paid a commission on the three contracts we now have with Rock Island Arsenal.

Although this letter states that Tucker was employed on a full-time basis in January 1953, the contract providing for his full-time employment was executed on March 18, 1953, effective as of March 2, 1953 (see finding 9(b)).

(g) There is no evidence that Tucker used any corrupt or improper influence in obtaining Contract 1213 for the plaintiff.

9. *Modification of Tucker's contract.*

(a) With the award of the contract in suit to Acme on January 27, 1953, the demands on Tucker's time increased. From some time in February 1953 Tucker devoted the major part of his time to administration of Contracts 1213 and 8580 for plaintiff, including the procurement of subcontracts, expediting of parts and supplies, and liaison with POD. In the meantime he also solicited new business for Acme and assisted in the preparation of bids on this new business. What proportion of his time ostensibly devoted to the interests of Acme was actually occupied in his reprehensible secret deals with subcontractors as described in findings 22 through 24, *infra*, is not known.

(b) Commencing the week ending March 7, 1953, Acme increased its weekly payment to Tucker to $300. By an agreement of March 18, 1953, effective March 2, superseding all prior agreements, Acme hired Tucker and Norris on a full-time salary basis at $300 each per week. Each was to receive in addition 25 percent of the annual net profits of the Lansdale operation and, after Acme had recouped its Lansdale investment "all assets created by the Lansdale plant * * * will be owned by the partnership, or Acme and Norris-Tucker." The purpose of this agreement was to provide incentive to Tucker and Norris to build up this new department of Acme's business. Tucker's salary was reduced to $250 per week on October 11, 1953. Throughout his employment by Acme, Tucker was compensated on the basis of his weekly guarantee, whether or not it was denominated as an advance against commissions, and deductions were duly made from each such payment for social security and withholding taxes.

10. *Negotiations.* Acme's bid of October 23, 1952 (finding 7, *supra*) did not contemplate that the Government would furnish any financing or Government-owned production machines. On December 3, 1952, POD requested plaintiff to file a revised bid containing complete cost breakdowns and a list of proposed subcontractors, which was done December 12. The revised bid proposed a two-month overall post-

ponement of the delivery schedule. Meetings between POD personnel and Acme representatives (most frequently Norris and Tucker) were held from December 11, 1952 onward to discuss various aspects of the contract, including price, which POD felt to be quite low in comparison with other bids, but reasonable and attainable nevertheless in the light of the delivery schedule, subcontracting plans, and other factors then known to POD. Moreover, POD was influenced in favor of Acme because it would then be the only small business concern in the country manufacturing the recoilless rifle, and could possibly develop into an additional source of supply for the 20 mm. gun. POD was concerned, however, over plaintiff's ability to produce an item foreign to its experience and at an admittedly low price, and offered Acme an opportunity to withdraw its bid, which plaintiff refused.

11. *Request for Government machinery.* Acme had planned to subcontract the rifling phase of the proposed contract. When the rifling subcontractor withdrew its quotation Acme advised defendant, on January 13, 1953, that if it could obtain the necessary rifling and honing equipment either from Army Ordnance sources or elsewhere it would undertake to perform the rifling phase of the contract itself. At this time Acme also advised the defendant that it would manufacture the vent-assembly component in its own shop rather than subcontract it as planned, and gave information as to certain subcontracts which had been let, including one for the chamber assembly which had been tentatively subcontracted to All Metals Industries, Inc. Acme was then making arrangements to obtain the equipment and machinery necessary to perform those parts of the contract which it did not plan to subcontract. On January 20, 1953, Acme requested the use of two government-owned rifling machines, two lathes and two honing machines, which it estimated would cost $15,000 and take about ten weeks to repair and install. Acme assured POD that no V-loan would be necessary for contract financing because it had other access to funds, and requested a small increase in the ceiling price. On January 23, 1953, the Board of Awards at POD, contrary to the recommendation of POD negotiators, rejected Acme's bid because the delivery schedule calling for initial deliveries in May 1953 was too optimistic.

210-151—66——4

12. *Availability of Government machinery.* Following the rejection of Acme's bid by the Board of Awards a series of meetings were held at POD attended by representatives of POD, Acme and All Metals. POD announced the availability to Acme of government-owned machinery requested by Acme capable of producing in excess of Acme's delivery schedule if properly set up and tooled. It was recommended by the Philadelphia Regional Office representative of POD that the contract be awarded to Acme.

CONTRACT AWARD AND MODIFICATIONS

13. *Description.* Under date of January 27, 1953, negotiated Contract No. DA–36–034–ORD–1213(R) (hereafter referred to sometimes as Contract 1213) was awarded to plaintiff by POD, requiring plaintiff to manufacture and deliver 2,322 75 mm. recoilless rifles, M–20, at a unit target price of $337.23 (total $783,048.06), plus 24 sets of accessories, tools and equipment at a target price of $3,787 per set (total $90,888), all subject to limited price revision upward upon delivery of 30 percent of the rifles. The original contract provided for deliveries as follows:

Month Required:	Item 1: Rifles	Item 5: Sets
May	74	1
June	233	2
July	234	2
August	233	2
September	233	2
October	234	2
November	233	2
December	233	2
January	234	3
February	233	3
March	148	3
Total	2,322	24

Subsequent modifications to the contract up to May 7, 1954 resulted in various adjustments of quantities and prices, the total quantity finally required being 2,751 recoilless rifles, plus tools, accessories and parts at a total contract target price of $1,043,918.72. The modifications included changes in certain delivery schedules, provision for use of specific government equipment and machinery, agreements adjusting prices on items not meeting specification requirements, and the addition of spare parts to the procurement. Where

these modifications are relevant to the consideration of particular developments in contract performance they will be referred to specifically at the appropriate parts of these findings.

14. *Deliveries, scheduled v. actual.* The delivery schedules required by the contract as revised by supplements thereto, and the actual deliveries by the plaintiff, are shown in the following schedule:

DELIVERY SCHEDULES AND ACTUAL DELIVERIES

	Contract 1213 (R)		Supp. 3 (6/22/53)			Supp. 7 (1/25/54) Item 1	Supp. 9 (3/24/54)		Actual Deliveries	
	Item 1[1]	Item 2[1]	Item 1	Item 2	Item 3[1]		Item 2	Item 3	Item 1	Cum. (Total)
1953										
Apr.									2	(2)
May	74	1								(2)
June	238	2	30			30			30	(32)
July	234	2	125	1		125	[2]		2	(34)
Aug.	233	2	233	2					113	(147)
Sept.	233	2	233	2		60				(147)
Oct.	234	2	233	2		133			137	(284)
Nov.	233	2	233	2		133			100	(384)
Dec.	233	2	233	2		100			62	(446)
1954										
Jan.	234	3	233	3		100 (minimum)			106	(552)
Feb.	233	3	233	3		100 "			100	(652)
Mar.	148	3	233	3		100 "	[2]		49	(701)
Apr.			233	3		100 "			43	(744)
May			233	1	40%	100 "			104	(848)
June			233		50%	100 "			180	(1, 028)
July			233		10%	100 "			35	(1, 163)
Aug.						100 "				
Sept.						100 "				
Oct.						100 "				
Nov.						100 "				
Dec.						100 "				
1955										
Jan.						100 "				
Feb.						100 "				
Mar.						100 "				
Apr.						100 "				
May						100 "				
June						100 "				
July						100 "				
Aug.						100 "		40%		
Sept.						100 "		50%		
Oct.						70 "		10%		

[1] Item 1 refers to rifles, Item 2 to accessories, Item 3 to parts.

[2] "All line items for Item 2 shall be delivered on or before 31 July 1953 except that the 2,400 Rammers and 2,400 Fuse Wrenches shall be delivered by March 31, 1954."

15. *Contract provisions.* The contract contained the standard clauses for Changes, Assignment of Claims, Default, Covenant Against Contingent Fees, Termination for Convenience of the Government, and Disputes. In addition it contained the following provisions:

4. FACILITIES: In the performance of this contract the Contractor shall have the right to use the facilities listed in the FACILITIES CONTRACT between the parties numbered DA-36-034-ORD-1214F, subject to the terms thereof; and the unit prices of this supply contract are based on such use.

* * * * *

10. LIQUIDATED DAMAGES: ½ of 1% of the contract price of undelivered units for each day's delay after the date or dates specified for deliveries hereunder.

The following paragraphs shall be added to General Provision No. 11, DEFAULT, of Standard Form 32, and Paragraph (f) contained therein is hereby deleted:

(f) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and therefore in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay the amount set forth elsewhere in this contract; provided that the Government may terminate this contract in whole or in part as provided in paragraph (a) of this clause, and in that event the Contractor shall be liable, in addition to the excess costs provided in paragraph (c) above, for liquidated damages accruing until such time as the Government may reasonably provide for the procurement of similar supplies or services. The Contractor shall not be charged with liquidated damages when the delay arises out of causes beyond the control and without the fault or negligence of the Contractor, as defined in paragraph (b) above, and in such event, subject to the clause of this contract entitled "Disputes," the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance when in his judgment the findings of fact justify an extension.

(g) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

* * * * *

12. OVERTIME: No overtime work in excess of the six (6) day, eight (8) hour week shall be performed in this contract by employees of the Contractor without prior approval of the Contracting Officer except for such overtime as is necessitated by disaster, emergency or to complete heat cycles.

13. SPECIAL TOOLING: The *unit price* for Item 1 includes therein $14.00 as the estimated cost of special tooling.

* * * * *

20. COVENANT AGAINST CONTINGENT FEES: The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

* * * * *

GENERAL PROVISIONS

(Supply Contract)

* * * * *

31. GRATUITIES (O.P.I. [Interim] 64–51)

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing, by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing, of such contract; provided, that the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages of which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than 3 nor more

than 10 times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

* * * * *

35. GOVERNMENT-FURNISHED PROPERTY (ASPR 13-502)

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property which the schedule or the specifications state the Government will furnish (hereinafter referred to as "Government-Furnished property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-Furnished property of a type suitable for use will be delivered to the Contractor at the times stated in the schedule or if not so stated in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-Furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, if requested by the Contractor, make a determination of the delay occasioned the Contractor thereby, and shall grant to the contractor a reasonable extension of time in respect of such delivery of performance dates. The Government shall not be liable to the Contractor for damages or loss of profit by reason of any delay in delivery of or failure to deliver any or all of the Government-Furnished property, except that in case of such delay or failure, upon the written request of the Contractor, an equitable adjustment shall be made in the delivery or performance dates, or prices, or both, and in any other contractual provision affected thereby, in accordance with the procedures provided for in the clause of this contract entitled "Changes".

* * * * *

36. SPECIAL TOOLING (ASPR 13-504)

* * * * *

37. *Price Redetermination* (Form II-B).

(a) The prices stated herein may be increased or decreased in accordance with this clause. In no event shall the revised price exceed 115% of the Unit Price, as amended, of item 1 plus 110% of the Unit Price, as amended, of item 2

(b) *Times for negotiation.*

(1) Upon completion of delivery of 30% percent of item 1 to be furnished under this contract or upon expenditure of — percent of the total contract target amount, whichever shall occur last, the parties shall negotiate to revise the prices of all items theretofore and thereafter to be delivered. Within 30 days after the completion of delivery or expenditure of funds referred to above, the Contractor shall furnish to the Contracting Officer the statements and data referred to in paragraph (c) of this clause. * * *.

THE LANSDALE PLANT

16. *Locating Lansdale facility.* Norris and Tucker had recommended to plaintiff that its home plant at Oreland would be unsuitable for performance of Contract 1213, and advised that a separate plant should be established to handle Government contracts. Sidney Cohen of plaintiff company located a factory at Lansdale, Pennsylvania, which had been used as a hosiery mill, one-quarter of which was still occupied for that purpose. Plaintiff made arrangements to lease the available portion of the Lansdale plant for operation as its proposed Defense Works Division. Norris was placed in charge of operations as general manager of production, and as such was authorized to submit bids, sign Government contracts, award subcontracts, and hire and fire personnel. Tucker was put in charge of sales, Government contracts, and expediting and coordinating subcontractors. On January 8, 1953, Norris wrote to POD furnishing a layout of the Lansdale facility, describing its personnel and equipment, and stating in part as follows:

> As further explained to Mr. Karam and Mr. Oschwald, Acme has already invested many thousands of dollars in setting up an additional organization, specifically familiar with engineering, manufacturing and expediting of National Defense items, including the investment of many thousands of dollars in the new building at Lansdale, Pennsylvania, along with the necessary equipment, placing itself in a position to immediately perform on this contract, when awarded. Of note is that Acme is an established manufacturing concern, which is extending its facilities and capacity to include defense type manufacturing, and we feel the broadening of our facility not only is valuable to us, but also to our National needs.

17. *Lease of Lansdale plant.* On January 23, 1953, Acme leased that portion of the Lansdale plant which was not occupied by the existing tenant and was given the right, *inter alia*, "* * * to install steel plates on the floor for the purpose of properly supporting any of its machinery * * *."

SUBCONTRACT TO ALL METALS

18. *Services contract with Tucker.* All Metals Industries, Inc., was established in July 1951 at Latrobe, Pennsylvania, as a small machine shop. Its stock was owned equally by John Hopkins, its president, Edward G. Oppenheimer, its vice president, and by Leonard Morris. In the spring of 1952 All Metals learned collaterally that Tucker was for hire to solicit commercial and Government contracts. He was interviewed and his references checked. On October 1, 1952, All Metals entered into a written contract with Tucker for his services and agreed to pay him 5 percent of weekly gross sales up to $10,000 to customers procured by him, plus 3 percent above $10,000, with a minimum guaranteed weekly salary of $100 to be charged against commissions. The contract defined Tucker's services to include the solicitation of invitations to bid on commercial and Government contracts, preparation of price estimates on such invitations, rendering of advice as to production methods, collection of bills when requested, assistance in obtaining financing for performance of contracts which he might secure, and in locating materials. It provided for cancellation in the event of violation of contingent-fee provisions. All Metals eventually paid a total of $2,200 to Tucker under this contract.

19. *Procurement of Acme subcontract.* There is no record of Tucker's concrete accomplishments for All Metals in the form of business obtained through him until he informed All Metals of the possibility of securing purchase orders from Acme under Contracts 1213 and 8580. All Metals participated in some of the negotiation conferences between Acme and POD, which led to the award of Contract 1213 to Acme on January 27, 1953. On the evening of that day Norris and Tucker met with Oppenheimer and Hopkins of All Metals and Norris gave All Metals verbal assurance of giving it a subcontract to manufacture chamber and vent assemblies, which were components in the guns which Acme was to manu-

facture under Contract 1213. The fact is disputed, but it is reasonable to conclude that at least as of January 27, 1953, Oppenheimer of All Metals knew that Tucker was Acme's agent, although the officials of Acme other than the conspirators were unaware that Tucker was serving simultaneously as agent for All Metals in procuring the subcontract. The only Acme personnel who were aware of Tucker's double agency were Norris, Jack Epstein (see finding 1, *supra*), Philip Chagnon, and, of course, Tucker himself. By Acme purchase order No. 35986, dated February 2, 1953, All Metals was issued a subcontract for the production of 2,322 chambers and vent assemblies at unit prices of $71.29 (target) and $81.64 (ceiling) for the chambers, and $51.66 (target) and $58.93 (ceiling) for the vent assemblies. The subcontract contained the following clauses:

> CONTINGENT FEES: Seller warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give Buyer the right to annul this contract, or, in its discretion, to deduct from the contract price or prices the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by Seller upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by Seller for the purpose of securing business.
>
> CANCELLATION: (b) Buyer also reserves the right at any time whenever the prime contract is cancelled to cancel this order, or any part thereof, by written notice to Seller, even though Seller is not in default hereunder, and this order is subject to all the terms and conditions of the usual standard form of provisions of clauses providing for the termination of supply contracts for the convenience of the Government, and to all the terms and conditions of any prime contract to which this order relates. Thereupon Seller shall, unless the notice otherwise specifies, discontinue all work and the placing of orders hereunder and shall cancel all existing orders and subcontracts. Upon such cancellation settlement of any amounts due the Seller shall be in accordance with such equitable settlement of any approved and allowed by the Government as being reimbursable to the Buyer under the prime contract. Buyer shall be under no liability for the payment of such settlement until it receives

from the Government approval and allowance of Seller's claim in respect of such settlement.

The subcontract price included latently the sales commission due Tucker from All Metals.

20. *The "shakedown".* On or about February 17, 1953, Hopkins and Oppenheimer of All Metals were advised by Tucker and Jack Epstein (then superintendent of Acme's Oreland plant and son of its president, Joshua Epstein), that All Metals' purchase order 35986 from Acme would be canceled unless All Metals paid Jack Epstein $25,000 in cash. Jack Epstein falsely represented himself to be a vice president of Acme and Oppenheimer assumed erroneously that he had the power to cancel the subcontract and that Joshua Epstein was implicated, neither of which assumptions was true. Oppenheimer assumed that it was an "income tax dodge" of some kind. On the protest of Hopkins and Oppenheimer that All Metals was not financially able to meet this demand, Tucker and Jack Epstein suggested that, as an alternative, All Metals should let a contract for $23,500 to Gunn Engineering Company for "engineering services", while Acme's subcontract to All Metals would be increased commensurately. This alternative proposition had been cleared by Tucker and Jack Epstein with Norris beforehand. Gunn Engineering Company was a dummy corporation which had been organized on or about February 16, 1953, and was owned by Tucker, Norris and Jack Epstein, without the specific knowledge of Acme's officers until around the time of the cancellation of Acme's Contract 1213 in August 1954. All Metals accepted the alternative proposal under economic duress, and on February 18, 1953, All Metals issued a purchase order to Gunn Engineering Company for "Consulting Engineering Services and Tool Design as Per Verbal Agreement" for a price not to exceed $23,500 payable in installments. On the same day Acme issued purchase order 36108 to All Metals for chambers and vent assemblies which superseded the earlier purchase order of February 2 and increased the vent assembly prices by $10 per unit to cover the amount extorted from All Metals as related above. Through May 5, 1953, a total of $12,000 was paid by All Metals to Gunn Engineering Company by check. Needless

to say, Gunn Engineering Company rendered no services whatsoever to All Metals.

21. *Effort to expunge consequences of Gunn purchase order.*

(a) Following the May 5, 1953 installment paid by All Metals to Gunn, Tucker instructed All Metals to discontinue further payments, which All Metals did. In June 1953 Tucker told Oppenheimer that Norris was under official investigation and that he wanted to clear up the situation and cancel certain transactions that had been entered into. Principally Tucker wanted to erase the effect of the "shakedown" transaction narrated in finding 20, *supra*, and to create an appearance that he had not been All Metals' paid agent during the shakedown period.

(b) To accomplish this, on or about June 25, 1953, Tucker gave All Metals a letter predated February 10, 1953 terminating his services contract with All Metals as of that date. Having previously in March 1953, for obscure reasons, assigned this services contract to one Philip Chagnon, who immediately reassigned it to Gunn, on June 25 by means of a "Release and Acknowledgement" backdated to March 20, 1953, Tucker canceled and voided these assignments. Oppenheimer then canceled by letter All Metals' purchase order of February 18, 1953 to Gunn. In furtherance of the fiction, Oppenheimer drafted a letter which he wanted Acme to send to All Metals, and sent this to Tucker's residence with a covering letter. Under date of June 30, 1953, this letter on Acme's letterhead (composed as stated by Oppenheimer) was sent by Norris to All Metals. It purported to reduce retroactively by $11.50 per unit the price in Acme's second purchase order (No. 36108) to All Metals, which, as has been described, had increased the first purchase order by $10 as part of the "shakedown". Since by this time All Metals had already delivered and billed Acme for one shipment (four units) under the second purchase order at the inflated price, the letter of June 30, 1953 from Acme provided that a credit memorandum would be issued to Acme for $202.71, $41.04 of which represented the inflationary element in the invoice for the first shipment. Also, on June 30, 1953, a supplement was issued by Norris to Acme purchase order 36108 reducing the unit price of vent assemblies by $11.50, and

halving the quantity of vent assemblies. On August 15, 1953, Acme paid the June 3 All Metals' invoice after deducting the credit, and thereafter all invoices submitted by All Metals to Acme for completed shipments were paid at the corrected prices. All Metals corrected its books of account to reflect these price readjustments. As of June 30, 1953, its books carried as an uncharged expense the $12,000 which it had paid to Gunn up to May 5, and it was not charged in the books to the Acme subcontract for chambers and vent assemblies. All Metals' accountant testified that the $12,000 was not included as a contract cost by All Metals directly or indirectly in either its original cost submission for termination purposes to the Army or in the damage schedule filed in the instant proceeding for audit under former Rule 28.

(c) The defendant concedes that by its revision of the second purchase order from Acme, All Metals reduced its price to less than the price in the first purchase order, but contends that the method of computation employed by Oppenheimer and Tucker in arriving at the amount of the reduction left in the ultimate cost figures the $12,000 which All Metals had paid to Gunn, so that its final price to Acme and its claim to the Government necessarily included a kick-back element in violation of the statute. Thus, the method of computation was as follows:

The sum as yet unpaid by All Metals to Gunn under the bogus purchase order was $11,220 (i.e., $23,220 less $12,000 already paid). This $11,220 was added to $15,487.74 (the 5 percent commission due Tucker for procuring the purchase order from Acme), and the resultant total of $26,707.74 was deducted from the price in the second purchase order No. 36108, thus providing a basis for a new unit price by dividing the number of units into the reduced total.

(d) The facts from which the parties reach opposite contentions are correct as stated. If we refer to the successive purchase orders from Acme to All Metals as the first, second and revised in the order of their issuance, it appears that the prices charged by All Metals in the first and second purchase orders included latently Tucker's commission, but the revised purchase order did not. The amounts paid to Gunn by All Metals were buried in the cost structure of the second and revised purchase orders but not in the first one. Since

there is no evidence that All Metals made any effort to recover the $12,000 extorted from it by Gunn, it is concluded that, in its final cost structure on which its ultimate revised price to Acme was based, All Metals included the $12,000 paid to Gunn in exchange for a waiver by Tucker of the $15,487.74, which was technically owed him [1] for commissions and which had been indirectly included in All Metals' cost structure underlying its initial price to Acme.

TUCKER'S DUPLICITOUS AGENCY FOR OTHER SUBCONTRACTORS

22. *Manalapan.*

(a) On November 10, 1952, Tucker entered into an agreement with Jaime Kohan, trading as Manalapan Machine & Welding Works, whereby for a minimum six-month period Tucker was to be employed on a non-exclusive basis as sales representative to secure contracts for Manalapan to perform at a minimum weekly salary of $100 which was to be applied against commissions earned on business brought in. Tucker took Kohan to see Norris at the Acme plant to look over some blueprints for a potential subcontract. After some negotiations and the rejection by Acme of an initial price which was too high, Manalapan was given a series of purchase orders by Acme relating to the latter's Contract 1213 during the period from February 1953 to July 1953. Only a portion of Manalapan's various quotations were accepted. Some of the parts it furnished to Acme were unsatisfactory and required reworking. Manalapan's prices to Acme included latently amounts paid by Manalapan to Tucker under the employment agreement described above. Pursuant to the employment agreement Manalapan paid Tucker $428.50 from November 21, 1952 to December 29, 1952 (which was prior to Manalapan's purchase orders from Acme) and $1,350 from February 16, 1953 to May 15, 1953 (which was during the performance by Manalapan of its purchase orders from Acme). Tucker shared these payments with Norris pursuant to their agreement. Not all of the work which Manalapan received from plaintiff was the result of

[1] As stated in paragraph (a) of this finding, Tucker's assignment of his 5 percent commission to Gunn was canceled, so that as of June 1953 All Metals was technically indebted to Tucker for commissions.

Tucker's efforts, for after the discontinuance of Tucker's agency for Manalapan it received requests from Acme for quotations.

(b) There is some confusion between Jaime Kohan, trading as Manalapan Machine & Welding Works, and a corporation by the name of Manalapan Machine Works, Inc., organized January 2, 1953. Jaime Kohan had no financial interest in this corporation but eventually served as its superintendent. His son was a principal in the corporation. The corporation received and performed some of Acme's purchase orders until November 1953, when it discontinued due to lack of funds. Other purchase orders were received and performed in the name of the individual proprietorship. Thereafter, at Acme's request and with the consent of the Manalapan Machine Works, Inc., Jaime Kohan, trading as Manalapan Machine & Welding Works, continued the work under the corporation's purchase orders until they were canceled. Acme treated both of the Manalapan companies interchangeably as a single legal entity. The corporation did not file a claim with the defendant, but the individual proprietorship did. The payments to Tucker described above were made by the individual proprietorship.

(c) Jaime Kohan of Manalapan knew or should have known that Tucker was an employee or agent of Acme at the time of their relations described above. The officers of Acme (as distinct from Norris, Tucker, Jack Epstein and Chagnon) did not know until after cancellation of Contract 1213 that Tucker was a paid agent for Manalapan.

23. *Foley Machine Company.* Foley Machine Company had been doing business for several years with Tucker, Sr., the father of Tucker, Jr. Norris and Tucker, Jr., had formed the Neptune Manufacturing Company, Inc. Foley knew that Neptune was Tucker's company. On January 24, 1953, Foley contracted on a contingent basis with Neptune for the latter's services in securing subcontracts from Acme, agreeing to pay it 5 percent of the gross amount of all orders or business which Neptune might get for Foley from Acme, with a weekly drawing account of $75 to be applied against commissions. Thereafter, Foley met with Tucker at the Acme plant to review the prints under the 1213 contract. At that time Foley knew or should have known that Tucker

was an employee or agent of Acme. On February 10, 1953, Acme issued a purchase order to Foley under its Contract 1213. Foley sent two checks to Neptune for $75 each, dated February 12 and 19, 1953. By a document dated February 27, 1953, and signed by Tucker, the contingent fee agreement of January 24 between Neptune and Foley was canceled. The two checks referred to above, which had not been deposited by Neptune, were returned to Foley. Defendant contends that Acme included the contingent fees paid to Neptune by Foley in its schedule of costs filed in this court pursuant to former Rule 28, that the contingent fee which Foley had agreed to pay Neptune constituted an improper and illegal cost and expense incurred or paid by plaintiff and/or Foley, and that it constituted an illegal kickback under 41 U.S.C. 51. Undoubtedly, the price charged by Foley to Acme in the purchase order included latently an amount sufficient to pay the contingent fee. The officers of Acme (as distinct from Norris, Tucker, Jack Epstein and Chagnon) did not know until after cancellation of Contract 1213 that Tucker and Norris were paid agents for Foley through the medium of Neptune.

24. *Nicholson Products Company.* In June 1952 Nicholson Products Company entered into an agreement with Tucker, Sr., hiring him at a minimum salary of $200 per week for his services in procuring customers. The agreement provided for an eventual increase in compensation to equal 5 percent of weekly gross sales up to $20,000 and 3 percent over that from all new business for which Tucker, Sr., was responsible. Through arrangements made by Tucker, Sr., Nicholson's president visited Norris at Acme to obtain details of a subprocurement. Nicholson then obtained some subcontracts from Acme under Contract 1213 and paid commissions to Tucker, Sr., on such subcontracts. There is no evidence that any responsible officers of Acme were aware of this matter.

25. *Johnson and Kuns.* After Norris was hired by Acme as general manager of the Lansdale plant he hired as his assistant at $150 per week one Philip Chagnon, who had been associated in previous business relations with Norris since 1944. Chagnon performed some expediting work but his duties for Acme were principally clerical in nature. He

entered into a private agreement with the firm of Johnson and Kunz to be paid a commission on any business he obtained for the latter. At Chagnon's recommendation Norris awarded a subcontract to Johnson and Kunz under Acme's Contract 1213. Johnson and Kunz paid commissions of $900 to Chagnon by checks made out to a mythical Robert Skillman, Chagnon's pseudonym. The checks were endorsed and cashed by Chagnon. No other Acme employee was aware of Chagnon's private commission arrangement. He used a pseudonym as a cover because he understood that the Federal Bureau of Investigation had commenced an investigation of certain aspects of Acme's performance under Contract 1213.

DEPARTURE OF THE CONSPIRATORS

26. *Norris.* From May to July 1953 Norris used several Acme employees to perform work on his farm, charging the labor cost of $895.52 and travel expenses of $150 against Contract 1213 on Acme's books. This matter was brought to the attention of Joshua Epstein, Sidney Cohen and Jack Epstein of Acme by an FBI agent who had investigated it. They disclaimed prior knowledge of it. Jack Epstein recommended that the labor costs should be charged against Norris' account and thus credited to Contract 1213 to remove the charge, but this was not accomplished. On September 4, 1953, Norris was discharged with the following letter from Joshua Epstein:

> We are obliged to advise you that your services with this company are terminated immediately because of:
>
> A. Your improper conduct and unauthorized expenditures, involving contracts with agencies of the United States Government, which resulted in your being investigated by the Federal Bureau of Investigation;
>
> B. Your voluntary abandonment of your duties, without excuse or permission;
>
> C. Other reasons well known to you, not necessary to relate in detail.
>
> We are making formal demand for reimbursement of all unauthorized withdrawals, or improper charges for salaries, moneys, value of materials or otherwise.

On September 11, 1953, Acme wrote to POD requesting the correction of the latter's records showing Norris' elimina-

tion as General Manager and his replacement by Jack Epstein as plant superintendent.

27. *Tucker.* Effective October 17, 1953, Acme reduced its weekly payment to Tucker to $250, and effective the week ending November 11, 1953, Tucker's services with Acme were terminated for reasons which are not specified in the record.

28. *Chagnon.* At the end of November 1953 Chagnon left Acme's employ.

29. *Epstein.* On November 23, 1953, Jack Epstein executed a false affidavit that at no time had he received any commission, etc., from any Acme subcontractor or supplier in connection with Government contracts. On August 28, 1954, he resigned from Acme.

30. *Knowledge of Joshua Epstein.* POD had advised Joshua Epstein on several occasions prior to the removal of Norris and Tucker that Tucker, Sr., was known to be a five-percenter in Government contract circles and that it was risky to hire his son, Tucker, Jr. Joshua Epstein did not consider this advice to be worthy of reliance, and as late as June 1955 asserted that he had found Norris and Tucker to be willing and competent workers and that their hiring had been justified. From the circumstances related in findings 26 through 29, *supra*, relative to the removal of the conspirators from Acme's payroll, particularly the inferences contained in the letter discharging Norris (finding 26, *supra*) and the contents of Jack Epstein's affidavit (finding 29, *supra*), it is reasonable to conclude that during the late summer and fall of 1953 some information had come to Joshua Epstein's attention leading him to suspect that the conspirators (including his son) had engaged in some improper activities. Rather than expose the culprits he induced their removal for suspected cause. Joshua Epstein was not called as a witness in the trial of the instant case. Jack Epstein's delayed resignation is understandable in view of the relationship which existed.

31. *Prosecution of conspirators.* Tucker, Norris and Jack Epstein were indicted for violation of the Anti-Kickback Law (41 U.S.C. 51, 52, 54). On April 13, 1956, after presentation of the Government's case, the defendant's motion for acquittal was granted (see finding 54(j), *infra*). The court, *inter alia*, said:

* * * I may say that I have been shocked at the sordid picture that has been exhibited here in this case. I have never seen such an exhibition of disloyalty to an employer as has been exhibited in the actions of these three men.

* * * the picture of a scheme set up, not only to increase the cost to the employer, but also to increase the cost to the United States, for a few paltry dollars, shows complete larceny in the hearts of these three defendants. They thought they were doing something crooked, and that is clear from the actions they took in effectuating this scheme. The scheme was despicable and morally reprehensible, but unfortunately within the narrow letter of the law.

This statute, as I see it, does not cover the contract in this case. I am intellectually certain that this is not the type of contract that is covered by the Act of March 8, 1946, being Title 41, Section 51, of the Act. There is nothing that I have seen in any of the regulations or in the congressional history which would indicate to me that there was any intention on the part of Congress to cover this particular type of contract. It may well be that Congress thought that in this type of contract the employer would be the one that would protect the interests of the United States, but no employer can protect himself against treacherous employees who are determined to commit morally reprehensible acts and who, for the sake of a few paltry dollars, set up the type of vicious scheme that has been set up in this case, which resulted in increased cost both to the employer and to the United States.

Therefore, it seems to me that the proper remedy in this case is that if Congress so feels, it should expand the provisions of Title 41 to cover just this sort of machination on the part of trusted employees; and I am ordering that my remarks here be transcribed, filed of record, and that the United States Attorney be furnished two copies so that if he wishes he may transmit a copy of my remarks to the Attorney General of the United States, to the end that Congress may if it so desires amend this Act to include as a crime the vicious and immoral type of conduct that has been exhibited in this case.

This case clearly showed that the employer was victimized, and I would say indirectly the United States was also, but the defendants were narrowly within the law. I don't know what type of action the employer may take against these employees, but I do say that I have nothing but contempt for their actions. Unfortunately, they are without the purview of this particular statute.

32. *Hochstuhl.*

(a) After Contract 1213 was awarded to Acme, Charles G. Hochstuhl of POD was assigned to administer it, along with a number of other contracts, under the immediate supervision of Harry Oschwald. In this capacity Hochstuhl journeyed to Ohio in March 1953 in the company of Acme officials to show them existing gun-manufacturing facilities. On his return to POD he submitted a voucher for his per diem and other trip expenses, and was paid the same. Adolph Gromada of Acme had paid $12.50 for Hochstuhl's hotel room charges on the trip, and this expense was charged by Acme against the contract in suit. On another occasion Acme charged against the contract hotel and meal charges for visitors, apparently Government employees, from Watervliet Arsenal. Hochstuhl's duties at POD in connection with Contract 1213 included recommending changes in the delivery schedule, for review by Oschwald.

(b) Hochstuhl was removed from his position with POD effective August 4, 1953 "* * * for making material false statements and exaggerations on your application standard Form 57", relating to some prior private employment. During his notice period he looked for other employment and was employed by Acme in August 1953 immediately after the termination of his employment at POD. POD advised Acme at the time, in Hochstuhl's words, that he "would be limited for a period of two years after being separated from the Government, which would restrict [him] in not negotiating any prices or any legal matters, any technical involvements of the contract, as a contractor's representative to any individual Government employee." If POD's advice to Acme was in writing it is not in the record.

During the first few weeks of his employment by Acme he helped Norris as an expediter of subcontracted components. After Norris was discharged in September 1953 and replaced by Jack Epstein as superintendent of the Lansdale plant, Hochstuhl was appointed as Epstein's assistant. As such he was given a variety of assignments, all of them relating in one form or another to paperwork. He helped to establish a control system for subcontracted work, correlated

many details relating to Acme's several Government contracts, maintained quality control records, prepared letters to Ordnance from Acme for signature by others, correlated plant inspections by inspectors for Acme and the Government, handled various matters with reference to the records concerning Government-furnished machines and tools, and helped with preparation of requests for change orders. He did not make personal contacts with Government representatives in connection with Acme's Government contracts.

In the fall of 1953 he came across a number of vouchers and other cost records in Acme's files which related to repairs made by Acme to Government-owned machines supplied under the Facilities Contract 1214. On his own volition and in the interest of keeping adequate cost records should need arise for them, he undertook to segregate and allocate the cost records to individual machines, and thereafter as additional repairs were made to the machines he kept a running record of them as to each machine. There is no suggestion that this record in its inception was made for the purpose of a claim by Acme, since as of the fall of 1953 there was no prospect of the contract cancellation in July 1954. Under date of January 1954 he prepared a chart which depicted certain facts pertaining to Government-furnished machines, such as when they were ordered and received, the periods they were out of operation or not functioning properly and the reasons, and the nature and cost of repairs.

In September 1954 at the direction of his superiors, Hochstuhl prepared an up-to-date record of Acme's expenditures in repairing the various Government-owned machines. This record was based on the records he had compiled a year earlier and had kept current in the meantime. The cost record was attached to the letter from Acme (signed by Mr. Cohen, its secretary-treasurer) to POD on September 7, 1954, in which plaintiff refused to return the machines to the Government unless POD gave assurance that Acme would be reimbursed for its cost of repairs. These facts are set forth in finding 53, *infra*. Other than as described there is no evidence from which it could possibly be inferred that Hochstuhl prosecuted a claim against the Government as Acme's agent.

33. *Lee.* Acme was experiencing difficulty in getting into production with the machines and tooling furnished by the Government. At Acme's request Watervliet Arsenal ordered Harold J. Lee, a machinist lead foreman at the Arsenal, to report to plaintiff's Lansdale plant for the purpose of assisting plaintiff in its technical problems. Under his official orders Lee worked at plaintiff's plant from his arrival on April 20 until April 24, 1953, at Government expense. Plaintiff requested the Arsenal to loan Lee's services for an additional week at Government expense, but this was refused. Instead, Lee was given official permission to remain at the plant, advising plaintiff in an absent-without-pay status from April 27 to May 1, 1953. During this latter period he worked 96 hours and was paid by the plaintiff $470 plus his hotel expenses, at the rate of $5 per hour compared to his Government salary rate of $2.60 per hour. The amount paid by Acme to Lee were charged against Contract 1213. Plaintiff was pleased with Lee's services and commended him to Watervliet Arsenal. Upon his return Lee filed with the Arsenal a trip report. There is no evidence of any improper conduct on the part of plaintiff with reference to Lee. Lee's observations of the plaintiff's operations and the nature of his services are described in finding 39(b)(1), *infra.*

CAUSES OF PLAINTIFF'S PRODUCTION DELAYS

34. *Prefatory statement.* The plaintiff contends that the defective condition of certain items of machinery furnished by the defendant under a so-called Facilities Contract, some of which machines were also used by its subcontractor, All Metals, was responsible for its inability to adhere to the original and subsequent delivery schedules under Contract 1213. Acme also asserts that the defective machinery caused not only the incurrence of unreimbursed costs of machinery repairs in excess of those anticipated, but also the delays which led to the assessment of liquidated damages for delinquency in deliveries. Plaintiff seeks to recover these costs and to have remitted the liquidated damages which have been withheld. The defendant contends that the machinery it furnished plaintiff was not defective but was usable, that plaintiff's difficulties in its use were attributable to improper

installation and operating incompetence, that plaintiff's actual cost of repairs and installation was well within its original estimate, that $44,358.58 of the amount spent by plaintiff for special tooling was included in its bid price (as amended by Supplemental Agreement No. 6) and the balance was plaintiff's responsibility under the terms of the Facilities Contract, and that the part of plaintiff's delays not attributable to its own deficiencies was attributable to the failure of All Metals to adhere to subcontract delivery schedules.

35. *Facilities Contract.* Clause 4 of Contract 1213 provided that plaintiff would have the right to use certain Government-owned machinery enumerated in the so-called Facilities Contract (No. DA-36-034-ORD-1214F) entered into between the parties simultaneously with Contract 1213, although not fully executed until February 27, 1953. The Facilities Contract contained the following selected provisions:

TITLE II

GOVERNMENT FURNISHED FACILITIES

ARTICLE II-A. DELIVERY.

1. The Government shall furnish to the Contractor the facilities described in Schedule "B", attached hereto and expressly made a part hereof, for use in the performance of certain supply contracts, identified in Article IV-A. The Government shall deliver, or has already delivered, such Schedule "B" facilities at the time or times stated in such Schedule or if not so stated in sufficient time to enable the Contractor to perform the affected supply contract(s). If any such facilities are not delivered to the Contractor by such time or times, or are delivered in such condition as to require repair or rejection pursuant to the provisions of Paragraphs 2 and 3 of this Article, the appropriate Contracting Officer, upon written request of the Contractor, may equitably adjust the price, the time of performance, and other terms and conditions of the affected supply contract(s). In no event shall the Government be liable to the Contractor for damages or loss of profit by reason of any delay in delivery or failure to deliver any or all of the items set forth in Schedule "B", or for delivery of such items not in satisfactory operating condition or not of a suitable type. Any failure by the parties hereto to agree upon such equitable adjustment shall be determined in accordance with the article of the related supply contract(s) entitled "Disputes".

2. In the event Schedule "B" items are not in fit operating condition, the Contractor shall repair, restore, or rehabilitate such equipment so as to make it serviceable or fit for use (cost connected with such repairs, restoration, or rehabilitation shall not be reimbursed to the Contractor).

3. The Contractor reserves the right to reject any Schedule "B" facilities which are not of a suitable type or not in fit operating condition, or are not reasonably capable of being restored, repaired, or rehabilitated so as to make them serviceable.

ARTICLE II–B. INSTALLATION.

The facilities under this Title shall be installed by the Contractor in its plant or plants or, if approved in writing by the Contracting Officer, for temporary use in the plants of first tier subcontractors. All such facilities installed in plants of first tier subcontractors will be operated and maintained in the same manner as the facilities located in the Contractor's own plant or plants and the conditions of this contract shall apply to such facilities. It is the responsibility of the Contractor to see that all provisions contained in the contract for the protection of the Government's interests in said facilities will be incorporated in the agreement under which such facilities are so placed.

ARTICLE II–C. TITLE.

Title to all property furnished by the Government shall remain in the Government. Title to the property furnished by the Government shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

TITLE III

COST OF THE WORK AND PAYMENT THEREFOR

ARTICLE III–A. REIMBURSEMENT FOR CONTRACTOR'S EXPENDITURES.

1. For the performance of this contract, the Government shall pay to the Contractor the costs and expenditures determined to be allowable in accordance with Section XV, Armed Services Procurement Regulation, as in effect on the date of this contract (such section being hereby incorporated and made a part of this contract by reference) for the following:

a. Cost of facilities procured from sources other than his own manufacture:

(1) The net invoice price therof.

(2) The cost of transportation to the Contractor's plant or other place of installation of said facilities, provided, however, that no reimbursement shall be owing to the Contractor hereunder when the invoice price described in subparagraph (1) has included the cost of transportation.

(3) Allocable overhead and general and administrative expenses.

(4) Any Federal, State or Local taxes arising from the acquisition for or delivery of such facilities to the Government.

b. Facilities manufactured by the Contractor: (other than those items included in subparagraph (c) below):

The costs incurred by the Contractor in manufacturing facilities hereunder as determined in accordance with Section XV of the Armed Services Procurement Regulation.

c. Standard or commercial items manufactured by the Contractor in accordance with provisions of Article I–A–5.

2. Costs and expenditures for the following will not be reimbursable hereunder:

a. Installation of facilities furnished by the Government (Schedule "B" facilities).

b. Installation of facilities acquired or manufactured hereunder (Schedule "A" facilities).

c. Plant rearrangement, rehabilitation and incidental construction necessary for the installation of facilities.

SCHEDULE "B"

2—#4 Rifling Machines
2—Boring Lathes
2—Honing Machines
2—Boring Bars 14′ 6″ each
1—Boring Bar 18′ 8″ to be modified for the rifling machine
1—Honing Bar & head complete
2—Rough Reamers complete
2—Finish Reamers complete
1—Set of Babbitts
1—Set Broach Rifle Cutters
1—Rifling Head
Plus Manufacturing Aids available from Watervliet Arsenal.

All items of Schedule "B" shall be furnished f.o.b. Watervliet Arsenal, and Contractor shall bear the cost of freight, installation and repairs without reimbursement by the Government.

By letter dated January 27, 1953, Acme (per Norris and Chagnon) advised POD that the contractor would bear the expense of transporting, installing and repairing the two rifling machines, two boring lathes, and two honing machines listed in Schedule "B" of the Facilities Contract.

36. *Description of machines furnished.* The defendant furnished the plaintiff with a total of 19 machine tools, six of them under the basic Facilities Contract, and the balance under supplements 1, 2 and 3 thereto, issued in May 1953, and in January and April 1954. The following schedule describes each of the machines by name, gives its Government tag number for identification purposes, provides where known the date of manufacture of each machine and its cost when new, the date received by the plaintiff, and the condition of each machine.[2] [See schedule on page 93.]

Items numbered 1 through 11 in the foregoing schedule were authorized by Contract 1214 and Supplement 1 thereto, and as to them the plaintiff was contractually obligated to bear the cost of freight, installation and repairs without reimbursement from defendant. The remaining items 12 through 16 in the schedule were authorized by Supplements 2 and 3 to Contract 1214, and as to them the plaintiff was contractually obligated to bear the cost of freight to its plant without reimbursement from defendant. As consideration for use of defendant's machines listed in the above schedule (except Items 1 through 6 for which there was no charge), the plaintiff agreed to a reduction of its Contract 1213 price by $18,602.55.

37. *How to make a gun barrel.* The plaintiff subcontracted the manufacture of the principal components of the rifle, except for the barrel which it manufactured in its plant at Lansdale. The plaintiff's manufacturing process for the production of rifle barrels consisted in general of the following sequence of operations:

(a) A seamless tube or forging furnished to plaintiff by the defendant was brought to a rough finish of the prescribed inside diameter of the barrel on a horizontal boring lathe, sometimes referred to as a reamer. The tube was placed on the lathe and secured firmly. A cutting tool of appropriate

[2] As will be shown later, the data relating to the reported condition of each machine is often unreliable.

Item No.	Type	Tag No.	Date of Mfr.	Original cost, new	Date ordered by plf.	Date supplied by def.	Condition [1]	Misc.
1	Hydraulic rifling machine	WV3938	1942	$17,852	1/20/53	3/5/53	R-3	
2	Mechanical rifling machine	C-1-5-A	1932	30,000	"	6/9/53	O-2	
3	Boring lathe, Le Blond	WV3990	1943	30,300	"	2/17/53	O-2	
4	Boring lathe, Le Blond	WV3992	1942	30,245	"	2/16/53	O-2	
5	Honing machine (Barnes)	WV8530	1942	15,137	"	2/17/53	O-2	
6	Honing machine (Barnes, Model 3)	ORD-11342-741	1952	30,415	"	10/5/53	O-2	
7	Lathe, Boye & Emmes, Model C	ORD-11342-713	1951	12,277		5/11/53	O-2	
8	Lathe, "	ORD-11342-714	1951	12,277		5/11/53	K-1-Base cracked at previous weld.	
9	Thread miller (Smalley)	WV3171	1942	8,500		2/13/53	O-2	
10	" "	WV2120	1939	7,651		2/13/53	R-2	
11	" (Lees-Bradner)	WV7020	1942	9,051		3/3/53	O-3	
12	Vertical milling machine (Cincinnati)	WV5081	?	7,582		?	?	
13	" "	WV2941	?	8,324		?	?	
14	3-Engine lathes (Reed Prentice)	ORD-759F 31, 33, 36.	?	22,041		?		
15	Milling machine (Lees-Bradner)	POD1092	?	8,995				
16	2 Lathes (Boye & Emmes)	ORD-11342 722 & 723.	?	24,554		?	?	

[1] The symbols used in this column to define condition of machinery are described in the official "Condition Code" as follows:

O-2—Used—Usable without repairs—good. Used property, more worn than O but still in good condition with considerable use left before any important repairs would be required.

O3—Used—usable without repairs—fair. Used property which is still in fair condition and usable without repairs; however, somewhat deteriorated with some parts (or portions) worn and should be replaced.

K-1—Used—reconditioned—excellent. Used property but repaired or renovated and in excellent condition.

R-2—Used—repairs required—good. Used property in good condition but considerable repairs required. Estimated cost of repairs would be from 11 to 25 percent of acquisition cost.

R-3—Used—repairs required—fair. Used property, in fair condition but extensive repairs required. Estimated repair costs would be from 26 to 40 percent of acquisition cost.

size was placed tightly on the head of a boring bar. The machine then pushed the boring bar with the cutting tool at its head through the gun tube and as it rotated the cutting tool removed the metal evenly from the inside diameter of the tube until the desired dimensions were obtained.

(b) The tube would then be cut on a lathe to form the outside dimensions, including the taper of the barrel.

(c) The tube or barrel would then be placed on a honing machine for honing the interior of the barrel to the dimensions and smooth finish required, the honing being performed by a series of honing stones being passed through the tube on the end of a ram.

(d) Following this the rifling grooves were cut in the interior of the barrel by means of a rifling machine or broach. The barrel was placed on the machine and secured firmly. The appropriate size cutter blade was placed on the head of a rifling bar and fastened securely in place. To obtain the desired rifling the machine then pushed the rifling bar with the cutter at its head through the barrel in a spiral motion imparted by means of a key riding in a curved groove around the rifling bar. The machine then withdrew the bar from the barrel and the next larger size cutter was placed on the bar and the operation was repeated. The process continued with a larger size cutter blade being used on the head of the bar on each successive pass until the rifling or grooves inside the barrel were sufficiently deep and accurate to meet specifications.

(e) Finally, the breach end of the barrel was threaded on a thread miller and the barrel was paced off to the required length.

38. *Installation of machinery.*

(a) The schedule in finding 36, *supra*, shows that most of the machines furnished plaintiff by the defendant arrived at the Lansdale plant at various dates from February 13 to June 9, 1953. They were large and heavy, ranging in length up to 35 feet and in weight up to 40,000 pounds. For proper operation such machines must be absolutely level and be solidly fixed to foundations to prevent misalignment, vibration and movement. The building housing the Lansdale plant had formerly been a hosiery mill. It had a concrete

floor, the thickness of which was disputed by the witnesses, whose estimates varied from three to five and one-half inches. An older section of the floor in the back of the plant where the large boring lathes were installed was repaired by plaintiff, but the remainder of the floor area was more recently constructed of reinforced concrete. The previous occupant had installed and operated knitting machines on the concrete floor. Knitting machines are not as heavy as the machines loaned by defendant to plaintiff to make gun barrels.

(b) There is a wide discrepancy in the testimony of the witnesses as to the adequacy of the plaintiff's installation of the machines in question, some of the testimony being diametrically contradictory. In general the plaintiff's witnesses testified that the legs of the two boring lathes were solidly based in specially excavated and poured concrete foundations four feet square and four feet deep, that the other machines were bolted to steel plates laid on top of the newer part of the concrete floor and were anchored to the floor by one inch round bars driven three feet deep into the floor and grouted in, and that, although one of the rifling machines vibrated at first, that was quickly corrected and thereafter none of the installed machines broke through the concrete or moved when in operation. On the other hand, several witnesses produced by defendant had been employed by plaintiff at the Lansdale plant for various periods in 1953 and 1954 and conveyed a radically different impression. They testified collectively that improper bedding of the machines caused them to vibrate in operation and to go out of alignment so that the high tolerances required in the end product could not be consistently achieved; that the honing machine delivered in October 1953 was the only machine which was properly installed at the outset and none of the other machines delivered earlier was properly installed; that they caused the concrete to crack because of vibration; that Gromada (plaintiff's plant engineer, deceased at time of trial) refused to heed advice to reset the machines because of cost; and that one of the machines had to be shored up with wedges to make it level.

(c) In weighing conflicting evidence on this point due consideration must be given to the fact that none of the official reports of plant operations made by defendant's person-

nel (so far as is contained in an otherwise voluminous record) make reference to inadequate installation as contributing to plaintiff's problems in operation of Government-furnished machines. Moreover, if it were to have been a serious factor at the time it is reasonable to believe that the plaintiff would naturally have taken immediate steps to correct the error early in the period of performance rather than permit it to go uncorrected and to plague all subsequent operations, for neither the cost nor the time in reinstallation would have been such as to warrant placing the entire contract in jeopardy by not correcting defects in installation. It is therefore concluded as a matter of fact that improper installation of machinery played a relatively unimportant role in plaintiff's production problems.

39. *Condition of government-furnished machines.*

(a) *Historical records.* Watervliet Arsenal, which supplied the machines to the defendant under the Facilities Contract, maintained a so-called "historical record" on each item of Government-owned machinery in its possession. The historical record described each particular machine in detail, listed its accessories, recited its successive uses, and reported its condition by means of a code as shown in the schedule included in finding 36. The historical record was not an entirely reliable reflection of the condition of the equipment, for not only did it have some gaps in the sequence of uses, but also the condition reported by code was based on visual inspection in most cases instead of on operating experience, whereas certain types of defects would become apparent only in the course of operation. The historical record also did not relate the experience which previous users had with the machine. Watervliet Arsenal did not test the machines to determine their operability prior to delivering them to plaintiff. When the Government supplies a contractor with a Government-owned machine tool under a Facilities Contract, it certifies only that the machine is capable of performing a certain function as indicated in the historical record, and does not certify that the machine is equipped with all the special tooling and accessories needed to manufacture a variety of weapons. The terms "special tooling" and "accessories" are

different, but the difference is difficult to define and the terms are often used interchangeably with reference to particular devices used as adjuncts to the basic machine.

(b) *Contemporaneous writings relative to condition.* Throughout the period of contract performance the plaintiff frequently complained to the defendant that the Government-furnished machines were defective, and on numerous occasions the defendant sent inspectors and other technical personnel to investigate the complaints and to render assistance to plaintiff. Some of the complaints and reports of inspectors throw contemporaneous light on the condition of the machines and are quoted herein in pertinent part or are paraphrased.

(1) Under date of May 4, 1953, Harold J. Lee, machine shop foreman at Watervliet Arsenal, prepared the following report of his visit to the Lansdale plant from April 20 through May 1, 1953:

FACTS:

On arrival I found that the contractor lacked a considerable amount of necessary small tooling. I pointed out what was lacking to the Shop Superintendent and they proceeded to either make or procure what was needed. For example, they had no keys with which to key their broach head to the bar or key the adapters. They had no bore sizer, and had no plugs for turning.

They were using a follow rest in lieu of a guide rest for starting reamers and it was proving unsatisfactory so I suggested this be changed. They replaced the follow rest with the proper bushing guide support and made new bushings. I also found a great deal of variation in the sizes their reamers were made to. This condition was corrected along with suggestions I made in regard to the method of holding the carbide tips. I found after all the conditions were corrected that the first reamer had insufficient stock removal so I suggested elimination of the first reamer. This proved quite satisfactory. The bores came straight and the reamers held size plus the fact that it cut the boring time in half, and eliminated the maintenance on one reamer. When I left they were boring at the rate of approximately nine tubes per nine hour shift; one shift per day.

On the hone they were having trouble with sufficient stock removal. This was corrected by reversing the stones every five passes. Ordnance inspection was not satisfied with the finish being produced, and I had them

change the coolant from Houghton honing oil to 60% Union base and 40% kerosene. I also recommended three hundred and twenty (320) grit stones manufactured by either Norton or Bay State. They also have difficulty inasmuch as the honing head is designed for hydraulic expansion and the machine did not have the hydraulic attachment. However, this equipment arrived at the plant the day I left. They also have no satisfactory method of measuring sizes in the machine. They have a short gauge that checks the bore size for about 12 inches on each end, but they need something faster and that will give a more complete check.

[NOTE: Mr. Lee testified that the lack of a hydraulic attachment did not affect the function of the machine but did lessen its efficiency.]

The second day after my arrival I suggested that they have their rifling bar checked for twist. Mr. Gromada assured me that it had been checked, however I questioned this, so they finally agreed to check it again. I instructed them in the proper procedure and I found that the twist was one turn in 25 cal. instead of the prescribed one turn in 22. After considerable checking they found that the proper bar being cut at Firestone would not be ready until 10 May. Watervliet Arsenal was contacted and arrangements made to borrow a bar from Watervliet. This bar was shipped to Lansdale and the machine was set up. I recommend changes in their holding fixtures as I felt that the method they were using was insufficient. After a few minor corrections in the machine, and setting up a method of sharpening and stoning the cutters the machine operated satisfactorily. I had Mr. Snyder have a set of plugs made up to turn the tubes between centers, and instructed them in the operation of the Lees Bradner Thread Mill machining. However, the proper hob cutters are not yet available. They will be there around 10 May. They had some difficulty finish turning due to a lack of a steady rest. They overhauled the one they had and made a roller rest which worked quite well.

Mr. Gromada was quite concerned over the fact that he thought that when the lug was shrunk on the Chamber the threads would collapse and the components wouldn't go together. I recommended that they use at least half of their tolerance on their threads. They did this and the first two tubes assembled satisfactorily.

The one great deficiency in their set up was the lack of engine lathes, which I am informed is being taken care of. Two Boye and Emmes lathes are en route from Pontiac, Michigan, and should take care of this.

CONCLUSIONS AND RECOMMENDATIONS:

When I left they had about seventy tubes through the boring lathe and about half of these were through the honing operation. They have installed a method of checking runout with a center spot so should have no trouble there. Once they get the necessary engine lathes they should have no trouble meeting their schedules.

Ordnance inspection seemed very inexperienced in regard to inspecting bores. They couldn't seem to make up their minds on finish, etc. Due to the indecision that was prevalent I would recommend that a visit by one of the inspectors from this installation would be a big help.

The manufacturer has adopted this Arsenal's method of manufacturing on the tube, and it would be a good idea, in my opinion, for the district to use our method of inspection.

(2) On June 8, 1953, plaintiff wrote the following letter to POD requesting an allowance for overtime expended as a result of trying to adhere to delivery schedules with defective Government-furnished equipment which delayed operations:

Inasmuch as subject contract was bid in October 1952 and award was held up until the latter part of January 1953, due to conditions beyond our control, it was necessary for Acme to secure six (6) pieces of Government-owned equipment on a loan basis, along with five (5) pieces of leased equipment. All this equipment, with the exception of two lathes which were new, had been in storage over a long period, and the true condition of said equipment could not be determined prior to receiving same in our Lansdale plant, installing and actually operating the equipment.

It was not until the middle of March that the true facts pertaining to the condition of the equipment became known. At this point many hours of straight time as well as overtime had to be worked in order to put this equipment in first class working condition.

A great deal of time was lost in waiting for special parts. In fact we are still awaiting some parts . . . operating the machines at approximately 30% of their efficiency in the meantime. For instance the Lees Bradner thread miller is still out of operation due to the lead screw being worn beyond repair, and we are presently chasing the threads on the rifle barrel on a lathe. The quality of the thread being done in this manner is very good; however, the time required is approximately five times longer than if the thread was hobbed with the Lees Bradner thread miller.

Similar conditions existed on the two Smalley thread millers which we leased from the Government and in turn loaned to our vendor, All Metals Industries, who is manufacturing the Chamber and Vent assembly for us.

Once these particular machines were in working condition we had already spent many hours overtime, and it was necessary to continue this overtime work in order to comply with the specified delivery schedule. It is a fact that we have been unable to adhere exactly to said delivery schedule, but we feel certain that by working this overtime all deliveries will be up to date within thirty (30) days from date.

Therefore, we feel justified in requesting payment or allowances in our renegotiation of costs for 4,826¾ hours of overtime at a total cost of $11,601.40, which was incurred between February 1, 1953 and May 17, 1953. We further feel that we will use approximately 50% of the above hours and monies in order to meet June and July deliveries, and hereby request an allowance for same.

(3) On June 18, 1953, plaintiff wrote the following letter to POD requesting an extension of delivery schedules due to defects in Government-furnished machines enumerated in some detail:

Pursuant to Article II-A, page 6 of facilities contract 1214F, and in accordance therewith, we are requesting the release accorded us under said provisions. Various machines supplied to us on the original award and later machines which we have procured on a rental basis were not in fit operating condition, or were delayed at point of origin for a long period of time due to clearance papers and packaging procedures controlled by Government agencies.

The following is a list of machines that required a large amount of repair, or were delayed beyond the delivery time stated by us when our present delivery schedule was agreed upon in the office of Philadelphia Ordnance District during the week of 19 January 1953. These machines are directly responsible for our inability to deliver seventy-four (74) guns in May, and a setback on our June schedule of 233 guns.

Rifling Machine—12G American—Govt. Tag WV-3938.

Requisitioned February 2 and received March 10. Has not been used to date as we are still waiting for parts that have been on order since receiving machine.

We expect this machine will be ready to operate within two weeks. The rifling bar that came with this machine had to be sent to Firestone for cutting proper groove from 25 cal. to 22 cal., and to date has not been received from them.

Honing Machine—Barnes Model 60—Govt. Tag WV-8530

Requisitioned February 3 and received February 18. Certain parts on the supporting table were missing and due to a long delivery given by the manufacturer for these parts, said parts were made in our shop. The machine was finally put in operation about the middle of April. The motor that came with this machine apparently had come from another machine and would not fit in its proper place. Several days were lost in making a table attachment to the machine for this motor.

Boring Lathe—No. 4 LeBlond—Govt. Tag WV-3990

Requisitioned February 2 and received February 18. The steady rests and chucks of this machine were made for a 12″ barrel. Therefore, we had to bush them down to fit the 75/MM barrel which involved over thirty days of machining and fitting as well as grinding. This machine had only one steady rest with it, and in order properly to bore the barrels, two steady rests are necessary. Inasmuch as we could not locate another steady rest, we proceeded to build our own steady rest, which involved considerable time. This boring lathe was put in operation about the middle of April.

Boring Lathe—No. 4 LeBlond—Govt. Tag WV-3992

Requisitioned February 2 and received February 18. This was in same condition as above boring lathe (WV-3990) and still is not in operation due to our having to make two steady rests for this machine. We expect to have it operating within the next two weeks.

Thread Millers—Smalley General—Govt. Tags WV-3171 and WV-2120

Requisitioned February 6 and received March 3 by our subcontractor All Metals Industries Inc., who are machining and threading the chamber and vent assembly for us. These machines had to be completely overhauled, and only recently were put in operation. Here again the lead screw had to be completely rebushed which involved the making of several parts due to the long delivery quoted by the manufacturer of said parts.

Boye & Emmes Lathes—Govt. Tags WY-2258894 and WY-2258895

Requisitioned March 31 and received May 18. These lathes were new and in good condition, and have been operating in our plant since May 20. These two lathes are helping us to pick up a back log on the O.D. turning of the barrel and the final machining of the O.D. on the barrel. Not having these machines sooner has hurt our delivery considerably at the present time, but within the next two weeks they will help to remove any bottlenecks on this operation.

Thread Miller—Lees Bradner—Govt. Tag WY-941347

Requisitioned February 10 and received February 18. We have had considerable trouble with the lead screw and hob on this machine, and through extensive repairs and completely overhauling the lead screw bushing and mounts, plus replacing the hob, we were just able to put this machine in operation on June 11. A replacement lead screw from the manufacturer was subject to six months delivery.

Rifling Machine—No. 4 Leblond—Govt. Tag C1-5A-2

Requisitioned February 2 and received March 3. Steady rests had to be rebushed from 8" down to 4½". Boring bar was sent to Firestone for changing the groove from 25 cal. to 22 cal. A bar was loaned from Watervliet Arsenal to put this machine in operation, and the original bar received on machine was returned to us from Firestone on June 5. We are now ready to apply this bar which involves a major change.

Other tooling such as jigs, fixtures and manufacturing gages requisitioned on February 11 and received from Watervliet Arsenal on March 4 could not be used. Inasmuch as we had anticipated using some of this tooling after it finally arrived, we then had to replace same which took considerable time. This is one of the reasons why we were unable to make our proper delivery. This is true especially on the two parts i.e. chamber and vent assembly, which All Metals Industries is machining for us, since not one piece of the Watervliet tooling could be used on their machines. These two particular parts are the ones that have held up our delivery.

Request was made on February 2 to Philadelphia Ordnance District for approval to use molds located at various subcontractors' plants to produce component parts. These subcontractors were currently producing these items for Firestone. Cleveland Ordnance District and Pittsburgh Ordnance District had to give ap-

proval since these involved their prime contracts, and final clearance was arranged on March 17.

Therefore, because of the conditions above and beyond the control of Acme Coppersmithing and Machine Company, we are respectfully submitting our revised forecast delivery schedule as follows:

June '53	30	January '54	233
July	125	February	233
August	233	March	233
September	233	April	233
October	233	May	70
November	233		
December	233	Total	2,322

This will enable us to complete our contract within the original completion period. If monthly forecasts can be exceeded, we request the authority to do so.

We would appreciate any consideration to the above request, and thank your offices for all past cooperation.

(4) On October 21, 1953, plaintiff wrote to POD requesting further extension of the delivery schedules, assigning the following reasons for delay:

The following production machinery is furnished by the Government:

MACHINE DESCRIPTION	DOLLARS EXPENDED	NET RESULTS
LeBlond Broaching Machine Govt. Tag G15A-2 Ser. 4BM8.	3,049.12	Unserviceable.
#120 American Broaching Machine Govt. Tag WV3938 Ser. 3628.	4,897.36	Unserviceable.
Barnes #10 Horizontal Honing Machine Govt. Tag WV3530 Ser. 2895.	2,973.72	Unserviceable.
Lees Bradner Thread Miller-Model HT Govt. Tag WV7020 Ser. 966.	877.75	Unserviceable.

This equipment was carefully examined before it was placed in the line, and it was only during production that these hidden faults became apparent. After a total expenditure of $11,497.95 these machines are still unserviceable.

Mr. Roy Hepburn, after a detailed investigation of the above equipment, has certified that the machines are unserviceable, and are responsible in large part for Acme's inability to meet the contract delivery schedule, and has recommended replacement.

Acme Coppersmithing and Machine Company, if the above machines were serviceable, is ready to meet the contract delivery schedule, but owing to the fact that Mr. Hepburn is replacing the unserviceable machines, the month of December will have to be zero (0) in order

to allow sufficient time to remove the unserviceable equipment and install replacement machines; also, there is a strong possibility that the tooling on the present machines may have to be altered to make them applicable to the new machines. In order to meet the requested delivery schedule, it will be necessary to have the replacement machines in the line by December 1, 1953.

(5) In a letter dated November 9, 1953 to POD the plaintiff stated in part as follows:

> As a result of a survey made by Machine Tool Section your District, two (2) machines supplied to us under Schedule "B" of above contract were found unserviceable, and we were advised that replacements of these machines would be made as soon as possible. Machines in question are:
>
> LeBlond Boring Lathe—Ser. 4GSR-151—Govt. Tag WV3990—Value $30,300.80.
>
> Lees Bradner Thread Miller—Ser. HT-966—Govt. Tag WV7020—Value $9,051.44.
>
> We request immediate arrangments be made for replacement of above machines as soon as possible.

(6) On November 9, 1953, the plaintiff wrote again to POD describing the condition of a honing machine recently received and requesting the defendant to supply certain items required for effective use of the machine, as follows:

> Your attention is invited to the Barnes #3 Horizontal Honing Machine, Govt. Tag 11342-741, Ser. No. 8869, which we received from Pontiac Motors, Pontiac, Michigan on September 21, 1953 through Schedule "B" Facilities.
>
> As you well know, this machine was procured by the Government for a 57/MM operation and was short a honing bar and head attachment for this type operation. Since it has been supplied to us for our 75/MM Recoilless Rifles, the guide trough bushing and oil trough are adapted for a 1¼" bar; our operation calls for a 2½" bar.
>
> Through investigating the possibility of getting this machine complete with its required components to effectively use this in our present production, we were verbally advised by Mr. R. Hepburn, Machine Tool Section, Philadelphia Ordnance District, that the items required to effectively use this machine in our production line would be supplied and paid for by the Government upon our submitting a quotation as to their cost. The following are parts we require:

1 10′ Honing Bar with 3″ diam. Honing Head to hone 60″ Tube.
2 Sets Stone Holders for above head.
1 Head Coupling
Guide Trough Bushing
Oil Trough

We were advised by the Micromatic people that the delivery on above items would take approximately twelve (12) weeks to complete at a cost of approximately $2,200. They will officially confirm this by formal quotation which should be received by us the latter part of this week. Copy of same will be forwarded to your office promptly.

(7) On February 23, 1954, plaintiff wrote the following letter to POD:

This will confirm several conversations we have had with you relative to the trouble we are having on the two broaching machines. As you realize, the broaching machines in our production set-up control the quantity of guns that can be shipped in any given month.

We have had very high rejections on gun tubes not holding their concentricity requirements, and we have found this fault lies within the mechanisms of these machines. We are extremely worried as to whether or not we will be able to meet our delivery schedule for March, and are wasting no time in thoroughly inspecting and adjusting the above machines. As soon as the fault is known, and if corrective steps can be taken, we shall notify your office.

These machines practically have been shut down for the entire month of February, and we can assure you that no time has been lost in trying to get these machines in operation. We have requested Ordnance Inspection to aid us in taking corrective steps.

(8) On March 1, 1954, plaintiff wrote the following letter to POD:

On the following dates our company requested either Messrs. Hepburn or McMenamin of Machine Tool Section P.O.D., to visit our plant and advise us the proper setting up of the two rifling machines, namely, LeBlond, Ser. No. 4RM8, Govt. Tag G15A–2 and American 12G, Ser. No. 3628, Govt. Tag WV3938 since we are having extreme difficulty in holding our rifling of tubes to the tolerance required by the print and Ordnance gages. The dates are: October 21, November 23, November 24, November 25, December 4, December 24 and February 10, 1954.

During each visit your Machine Tool Section has made certain recommendations on the adjustment, repair or replacement of parts on these machines, and in every case we have followed their instructions to the letter.

In addition to the above we requested the American Broach & Mach. Co. of Ann Arbor, Michigan, to send Mr. G. A. Deming to assist us in the setting up of the hydraulic system on the American broaching machine. Mr. Deming corrected the functioning of the hydraulic system enough to put us in operation. But, it was impossible to eliminate the erratic forward motion of the rifling bar due to leaks in the main cylinder and pressure control valves. To rectify this would require factory repairs.

During the latter part of January '54 your Inspection Branch was supplied a new concentricity gage to check rifling and the i.d. of the gun tubes. It was at this time that we realized we were faced with the rejection of a large quantity of tubes due to the use of this gage.

Please note that up to this time the gage originally put into service by Ordnance was functioning satisfactorily, meaning that our rifling machines were producing acceptable tubes on the original gage being used by Ordnance Inspection.

We have now reached a point where we feel we have exhausted all sources of know-how in rectifying the faults in these machines furnished by the Government. These machines are in proper alignment and level, but still there is some fault causing rejected tubes. We would greatly appreciate your office sending a man from Watervliet Arsenal to our plant who will be able to service these machines put them in efficient running condition or take the necessary action to eliminate our present difficulties.

Please note that we have lost complete production for the entire month of February, and if this condition exists any longer, our shipments for the next two months will be greatly endangered.

We feel that our procedure in manufacturing the 75 m/m Recoilless Rifle is accurate, and sound shop practice is now in full force and effect. In the interest of meeting our delivery schedules which we have firmly established over the last two months, we are asking for your immediate cooperation.

(9) On March 29, 1954, plaintiff wrote the following letter to POD:

We wish to offer our sincerest thanks and appreciation for the splendid cooperation and assistance rendered by the Philadelphia Regional Office, through Mr. Edward Dougherty, P.O.D. and Mr. Roy Hepburn and Watervliet Arsenal personnel in having a Mr. Earl G. Heiner of said Arsenal visit our plant on the 12th and 13th of March 1954.

As a result of these visits, recommendations were made to replace the one Mechanical Broaching Machine with a more serviceable one, and also the use of cutter heads presently being used by Watervliet Arsenal in the rifling of seamless tubing. It was also pointed out by Mr. Heiner, that the rifling bar on the Hydraulic Broaching machine will have to be repaired by regrooving the slot in the rifling bar. Arrangements are being made to ship this bar to Watervliet Arsenal for machining, after the unserviceable rifling machine is replaced, so that our production on rifling gun tubes is not endangered.

(10) On April 16, 1954, James F. McMenamin (presumably an expert sent by POD to plaintiff's plant) wrote to plaintiff as follows:

Your letter of April 8, 1954 received requesting a written report of my findings on your rifling machine in your plant on February 10, 1954.

Your Mr. C. Hockstuhl requested Mr. R. L. Hepburn in P.O.D. office to have me to go to your plant on the above date and on my arrival in your plant I found the rifling gauge had been replaced by a new gauge with .002" tolerance—the old guage had .004" tolerance.

In order to use the new rifling gauge, the tube when set-up in the rifling machine had to be in line within a .003" of a thousand in order for the new gauge to pass through the bore of the tube after rifling.

The following suggestions were made:

Make two (2) tube support brackets lining the brackets on the machine with the cutter bar support bracket. Spot turn the tube diameter on the engine lathe to suit the bore in the tube support brackets.

I requested the P.O.D. to give .003" tolerance on the rifling gauge, or increase the bore diameter in the tube .001" thousand. It was requested that the P.O.D. have the tubes stress relieved after the rough turn and rough bore operations.

I also noted that after parkerizing three or four tubes out of 12 at 180 degrees the gauge would not pass

through the bore. These tubes were returned to the Honeing Machine to be rehoned.

Mr. Haplan, P.O.D. Head Inspector at your plant was of the opinion your shop could produce these tubes with the present equipment by relining the machine. He asked for a week or two in order to line up the adjustable steady rest with the rifling bar and tool guide support bracket.

(11) On May 23, 1954, All Metals wrote the following letter to plaintiff:

We refer to your phone request of April 27 pertaining to our furnishing information as to the operating condition of the Smalley-General thread millers which we received under lease arrangement from Watervliet Arsenal.

In view of the fact that these machines were equipped with 440 volt motors which could not be reconnected for 220 volt service, it was necessary for us to delay installation until we could have 440 volt service installation made. This new service installation has just been completed within the last few days and we have the machines wired and ready for operation.

One of the machines, Arsenal number 3171, serial number 455, has been tried in operation and has proved to be satisfactory. The second machine, Arsenal number 2120, serial number 384, is completely wired and is in process of being set up for trial. As soon as trial runs have been made, we will report to you the operating condition of this machine.

With reference to both of the above machines, a considerable amount of work was necessary, both electrical and mechanical, to put them into operating condition. Apparently when these two machines were removed from operation and prepared for government storage, the person or persons doing the preparation were somewhat overzealous in application of the preservative material. For example, a good portion of the electric switch gears on both of the items had to be removed and replaced due to the fact that covers had been removed from switch gear boxes and preservatives sprayed on all electrical contactors and equipment. Most of the electric wiring connections had been removed by the expedient method of jerking them completely loose from their moorings. Much of the inter-connecting wiring was either so impregnated with preservative material, or damaged to the extent that it had to be replaced.

As you can see from the foregoing, we have spent considerable time and expense in preparing these machines

for operation in our plant, but we feel that the major portion of this work has now been completed and the machines will satisfactorily serve the purpose for which they are intended.

There are certain parts missing from the machines, such as hand wheels and handles, for which we will improvise replacements so that we may get the machines in operation at the earliest possible date. A complete inventory of electrical and mechanical parts, necessary for the operation of these machines which were not shipped to us, will be forwarded to you at a later date. We will also advise what electrical equipment it was found necessary to replace. Apparently all of the necessary change gears have been provided with the machines to permit them to produce the chamber and vent assembly parts.

40. *Other indicia of condition of machines.*

(a) *Boring Lathe No. 3990.* Under the Facilities Contract the Government was obligated to furnish plaintiff the subject machine, together with a rough reamer and a boring bar 14′ 6″ long. On or about February 17, 1953, the machine was delivered to plaintiff. The last use of the machine preceding its use by plaintiff, so far as disclosed by the historical record accompanying the machine, was in 1943, and at that time it was inventoried with certain related equipment and controls, including a boring bar 4′ long. At some subsequent undisclosed time, but prior to June 30, 1955, the Government furnished plaintiff with a 17′ 7″ boring bar. As of April 7, 1954, the machine was in plaintiff's possession in 0–2 condition, together with enumerated controls and accessories. There is no way of ascertaining the condition of the machine as of February 17, 1953. From February 17, 1953, through November 1953 plaintiff expended $1,902.02 on the machine, including $430.67 for repairs, $323.60 for installation expenses, and $1,147.75 for special tooling, the last item being so listed in the special tooling inventory dated July 15, 1958, attached to plaintiff's termination type claim. Included in the special tooling category of plaintiff's expenditures is $377.85 for a chuck, since the one furnished by the Government with the machine was not of the correct size. There is no record of an expenditure for fabrication or modification of steady rests for the machine, as plaintiff reported to defendant by letter dated June 18, 1953, but the historical

record indicates that only one steady rest was provided with the machine instead of two as required, so it is concluded that plaintiff had to fabricate at least one steady rest at an undisclosed cost, and the other steady rest required modification.

By letter of November 9, 1953, plaintiff reported that the Government had found this machine to be unserviceable, but there is no other record of such determination. It is considered unlikely, however, since between that date and the inspection finding of April 7, 1954, that the machine was then in 0–2 condition, plaintiff spent only $52.88 in repairs on it.

The installation expense of $323.60 includes $237.60 for the services of four men for three days to correct the bed of the machine at some undisclosed later date. This corroborates defendant's contention that the machine was defectively installed in the first instance.

Other references to the condition of the machine are to be found in the written communications reprinted in paragraphs (1), (3) and (6) of finding 39(b), *supra*.

Several conclusions are reached from the foregoing facts, viz: the defendant's failure to supply with the machine a boring bar of the size required by the Facilities Contract, an omission later rectified, is not claimed by plaintiff as a cause of delay. In the absence of definition in the Facilities Contract as to what is comprehended in the term "manufacturing aids available from Watervliet Arsenal", which the defendant was to furnish, it is assumed for want of any better interpretation that the aids in the form of accessories and special tooling which were actually supplied with the machine by necessary implication should have been usable for the purpose of manufacturing 75 mm. guns. Otherwise, the quoted phrase would be meaningless. In this case the defendant supplied a chuck and steady rests of the wrong size which occasioned the plaintiff some expense and delay to correct. In contracting to pay for repairs to the machine the plaintiff must have contemplated a reasonable amount of repairs, and the repairs itemized in record do not seem unreasonable or excessive. On the other hand, the plaintiff installed the machine improperly in the first instance and considerably later had to reinstall it, thus causing problems involving delays. Moreover, much of the plaintiff's prob-

lems with the machine arose from inefficient operation attributable to inexperienced employees, as reflected in the Lee report (finding 39(b)(1), *supra*). In summary, the defective nature of the machine, as a factor in plaintiff's costs and delays, was substantially outweighed by the factors of improper installation and incompetent operation, both of the latter being attributable to the plaintiff.

b) *Boring Lathe No. 3992.* Under the Facilities Contract the Government was obligated to furnish plaintiff the subject machine, together with a rough reamer and a boring bar 14'6" long. On or about February 16, 1953, such a machine was delivered to plaintiff. The last prior use of the machine disclosed by the historical record was in 1943, at which time it was inventoried with certain related equipment and controls which did not include a boring bar. At some subsequent undisclosed time prior to June 30, 1953, the Government furnished plaintiff with a boring bar 18'8½" in length. As of April 7, 1954, the machine was in plaintiff's possession in 0–2 condition, together with enumerated controls and accessories. There is no way of ascertaining the condition of the machine as of February 16, 1953.

From February 16, 1953, to April 21, 1954, plaintiff expended $2,457.86 on the machine, including $1,031.61 for repairs, $232.75 for installation, and $1,193.50 for special tooling ($720 of which was listed as such in a special tooling inventory dated July 15, 1958, attached to plaintiff's termination type claim). Of the expenses in the special tooling category, $423.60 is represented by the fabrication and rebuilding of two steady rests for the machine, to replace the steady rests supplied with the machine which apparently were designed to accommodate a different size gun barrel than the 75 mm.[3] Other references to the condition of the machine are found in the letter quoted in finding 39(b)(8), *supra*.

Study of the expenses to repair this second boring lathe lead to the conclusion that it was in somewhat worse condition than the first one and caused the plaintiff some delays. For example, the plaintiff's expenditures for fabricating two

[3] Comparative analysis of the plaintiff's vouchers and its complaint to defendant of June 18, 1953, indicates some confusion between boring lathes 3990 and 3992.

steady rests to replace the steady rests supplied with the machine occurred in August 1953, approximately six months after the machine was delivered. Whether or not the repairs to the machine exceeded reasonable expectations is conjectural. The evidence does not satisfactorily establish that the second boring lathe was improperly installed. It is probable that the plaintiff's lack of operating experience was fully as responsible as the condition of the machine for the difficulties and delays plaintiff had in its use.

(c) *Honing Machine No. 8530.* Under the Facilities Contract the Government was obligated to furnish plaintiff the subject machine, together with a complete honing bar and head. On or about February 17, 1953, the machine was delivered to plaintiff. The last use of the machine preceding its use by plaintiff was in 1951, and at that time it was inventoried with related equipment and controls. Its condition was not reported as of 1951, but as of September 15, 1954, was reported as 0–2. Upon delivery the machine lacked an hydraulic head attachment designed to expand the honing stones, but this arrived about May 1, 1953. The machine could be used without the attachment, but operated less efficiently without it and tended to hone the inside of the gun barrels unevenly. On June 18, 1953, the plaintiff complained of certain parts which were missing from the machine on delivery and which plaintiff had to fabricate, thus causing an alleged delay to mid-April before the machine could be operated, but the only parts which the defendant should have supplied, but did not so far as the record corroborates, are an electric motor purchased in May 1953 and the hydraulic head mentioned above, and two steady rests which the plaintiff fabricated.

From February 17, 1953, to May 22, 1953, plaintiff expended $2,067.42 in repairs and $1,238.40 in special tooling on this machine. The special tooling expense consisted of a filter, a pump and a set of stone holders, all of which appeared in a special tooling inventory attached to plaintiff's termination type claim dated July 15, 1958. The repair expense included $1,260 for the steady rests mentioned above, which are also classifiable as special tooling. By letter of October 21, 1953, to the defendant (finding 39 (b) (4), *supra*), the plaintiff referred to the fact that a Government repre-

sentative had declared the machine to be unserviceable and recommended replacement. This contention is not refuted in the record. Other references to the condition of this machine are found in the letters quoted in paragraphs (1), (3) and (4) of finding 39(b), *supra*.

Determination as to whether the machine supplied by the Government met with the requirements of the Facilities Contract involves an interpretation of what the latter required, an intimate understanding of the various parts to the machine so that the record of expenditures can be interpreted, and the customary resolution of conflicting testimony, none of which lend themselves to easy solution. The defendant was clearly at fault in not supplying an hydraulic head with the machine, and less clearly at fault in not supplying usable steady rests and in supplying a machine requiring excessive repairs. On the other hand, there is evidence that the plaintiff's lack of operating experience contributed to its difficulties. It is not established that the plaintiff's troubles were attributable to improper installation of the machine. By attaching significance to the fact that the machine was replaced after the plaintiff's complaint in October 1953 that it was unserviceable, it is concluded on balance that the machine was defective upon delivery, that its condition was worse than plaintiff could have reasonably anticipated and occasioned it excessive expense and delay, and that plaintiff's unfamiliarity and inexperience with the operating characteristics of the machine was also an important factor in the plaintiff's difficulties.

(d) *Honing Machine No. 741.* This was the second of the two honing machines which the defendant was obligated to supply plaintiff under the Facilities Contract. It was manufactured in 1952, used by another Government contractor, and was received by plaintiff on October 5, 1953 (over seven months late for some unexplained reason), at which time it was reported conflictingly to be in N–1 and O–2 condition, a contradiction which the record does not explain. In the three months following delivery of the machine the plaintiff expended $1,479.62 on it, including $229.80 for repairs and $1,249.82 for tooling and/or accessories. $1,132.79 of the latter item was denominated as tooling in the special tooling inventory which plaintiff attached to its termination

type claim dated July 15, 1958. By letters of November 9 and 17, 1953, to defendant, the plaintiff confirmed its understanding that the machine was designed for use in the manufacture of a different size gun and would require certain adaptations to use for making 75 mm. guns, which adaptations would cost the plaintiff $937.20 and would take eight weeks from the latter date to accomplish. Plaintiff requested authorization and reimbursement for the expenditure, and stated that the need for major repairs to the other honing machine was handicapping operations. There is no response in the record to these representations and they appear to be roughly consistent with the record of expenditures made to the second honing machine as that record is reduced by elimination of items either ordered long prior to the arrival of the machine or not clearly identifiable as a repair, an accessory, or as special tooling. Other references to the condition of this machine are found in paragraphs (1) and (5) of finding 39(b), *supra.*

(e) *Rifling* (*i.e., broaching*) *Machine No. 3938.* The defendant was obligated under the Facilities Contract to furnish the plaintiff two rifling machines, a rifling head, and one set of cutters. One of the rifling machines was received by plaintiff on March 5, 1953. The records accompanying the machine indicate that it was in R–3 condition as of August 1951 (per visual inspection) and was certified to be in 0–2 condition apparently as of September 1954, although the precise dates of these condition ratings are subject to some doubt. The top bar bracket was listed as broken, apparently as of August 1951. It was delivered to plaintiff with certain listed controls and attachments and/or accessories, none of which seem to include a rifling head or a set of cutters of the proper size. Subsequently the defendant supplied plaintiff with a steady rest fixture and a rifling bar for the machine. The tooling furnished to plaintiff was not adequate to hold the gun tube in place in the machine and had to be reworked to adapt it to the rifling of a 75 mm. gun barrel. The rifling bar furnished plaintiff by defendant had the wrong twist and plaintiff was delayed several weeks waiting for this to be corrected at a cost of $726.34.

Plaintiff expended a total of $2,708.92 on this machine, all but $754 of which was spent during the six months following

its receipt. Of the plaintiff's total expenses, $2,478.92 was for repairs, $35 for installation, $70 for maintenance, and $125 for tooling. In addition to the above expenses, defendant paid $1,280 (reimbursed by defendant) for a centering fixture for the machine as an item of tooling, and plaintiff bought $5,263.09 worth of expendable cutters. The testimony of defendant's witness that the machine was in good working condition as of May 1, 1953 is not consistent with the fact that all but $825 of plaintiff's expenses for the machine occurred after May 1, 1953.

In summary, it would appear as to this machine that the defendant delivered it in defective condition and without the equipment required by the Facilities Contract, and that it required frequent repairs which were both costly and time-consuming. Other references to the condition of this machine are found in the letters quoted in paragraphs (1), (3), (4), (7), (8), (9) and (10) of finding 39 (b), *supra*.

(f) *Rifling* (*i.e., broaching*) *Machine No. C–1–5–A–2.* The second of the two rifling machines required by the Facilities Contract was received by plaintiff on February 20, 1953. Its condition was listed conflictingly in the historical record and other documents relating to the machine as 0, 0–2, and "fair", but it is not clear whether these condition ratings apply to the time of its receipt by plaintiff, or to September 1954 when it was certified for inventory purposes, or to some other time. As guides to determine the condition of the machine at the time it was delivered to plaintiff the entries on the historical record are useless. Another handwritten entry on the historical record refers to "Scrap", but this is equally inconclusive.

Plaintiff spent $8,034.73 on this machine, including $1,266.40 for repairs, $35 for installation, and $6,733.33 for special tooling (including $5,188.28 for expendable cutter blades, $720.05 for modification of a rifling bar supplied by defendant, and $825 for replacement of a cutter head supplied by defendant).

The plaintiff experienced trouble with both of the rifling machines furnished under the Facilities Contract. Because of the erratic thrust of the rams carrying the cutter blades and shifting of the cutter blades inside the tube the lands

of the rifling would be scratched, the grooves would have tears, and there would be steps in the edges of the lands. The plaintiff made frequent complaints about the rifling machines and the defendant sent representatives on many occasions to advise and assist plaintiff in overcoming its difficulties. In March 1954 POD representatives recommended the replacement of rifling machine No. C–1–5–A–2, and repairs to the rifling bar on the other rifling machine. Other references to the condition of this machine are contained in the letters quoted in paragraphs (1), (3), (4), (7), (8), (9) and (10) of finding 39(b), *supra*.

(g) *Lees-Bradner Thread Miller*. Supplemental Agreement No. 1 of May 26, 1953 provided for the furnishing to plaintiff of the subject machine, which was received by plaintiff on February 18, 1953. It was delivered to the plaintiff without a steady rest, which was not listed among the accessories on the historical record. It is not clear from the record whether a steady rest is part of a general purpose machine such as this or is an item of special tooling, in which case it would have been the plaintiff's duty to provide. The historical record reports the condition of the machine conflictingly as being rated both 0–3 and "fair" as of April 7, 1954, and 0–2 apparently as of September 8, 1954. The Condition Code defines 0–3 condition to be "Used-Usable Without Repairs-Fair. Used property which is still in fair condition and usable without repairs; however, somewhat deteriorated with some parts (or portions) worn and should be replaced." Plaintiff overhauled a steady rest to use with the machine and fabricated a roller rest for it. It found the lead screw to be worn beyond repair and, instead of taking several weeks to order a replacement, dismantled and repaired the worn lead screw from end to end over a three-week period. The machine was repaired and in operation by June 11, 1953. On October 21, 1953, the plaintiff complained to defendant that the machine had been declared unserviceable by a Government representative, who had recommended that it be replaced. There is no record of a response to this complaint, but apparently the machine was not replaced since the historical record indicates that it was inspected and found to be in 0–3 condition as of April 7, 1954. At some time plaintiff

sent this machine to All Metals for use in performing the latter's subcontract, but it did not prove satisfactory in All Metals' operation and was returned to plaintiff. Plaintiff testified that it spent $375.10 to repair the machine, but offered no vouchers to support these charges.

(h) *Boye & Emmes Lathes Nos. 713 and 714.* These machines were received by plaintiff on May 11, 1953, at which time they were new and in good condition. Plaintiff spent $2,477.84 on the two machines, including $73.60 for repairs and the balance for six special roll lock centering plugs which were special tooling not included in the list of attachments and/or accessories contained in the historical record. The plugs were plaintiff's responsibility.

(i) *Two Smalley General Thread Millers Nos. WV 2120 and 3171.* These machines were received by plaintiff on February 13, 1953, and transferred to All Metals on March 3, 1953, for use in machining and threading the chamber and vent assemblies which All Metals was to manufacture for plaintiff under the subcontract. One of the machines was in 0–2 condition, apparently as of October 23, 1953, and the other was rated to be in R–2 condition at some undisclosed date. The Condition Code defines R–2 condition to be "Used-Repairs Required-Good. Used property in good condition but considerable repairs required. Estimated cost of repairs would be from 11 to 25 percent of acquisition cost." The defendant's acquisition cost of the machine was $7,651.32. On May 23, 1953, All Metals advised plaintiff that they had performed considerable electrical and mechanical work on the machines to put them in operating condition, that certain minor parts of the machines were missing, that the principal reason for delay in placing the machines in operation was that the All Metals plant had to be rewired to accommodate the 440 volt motors of the machines, and that both machines were by May 23 ready for operation and one of them had proved to be satisfactory. There is no record of All Metals' expenses in repairing and installing the machines, except a report in July 1954 by All Metals to POD that it had spent about $8,000 in repairing the two machines in question as well as two lathes and a milling machine which plaintiff had procured for All Metals from the de-

fendant. But there is no other proof of these expenditures in the form of vouchers, etc.

41. *Plaintiff's Inexperience.* In undertaking to manufacture 75 mm. rifles the plaintiff embarked on an undertaking completely foreign to its previous production experience. Both the personnel hired for the Lansdale plant and the machinery with which to perform the contract were new and untried to the plaintiff. It is quite natural that many production errors and inefficiencies resulted, such as improper installation and poor alignment of certain of the machines, unsuccessful experimentation with untried methods of fastening cutters to reamers on the boring lathes causing oversize cutting, inaccurate centering of the bushing which guided the reamer on the boring lathe through the gun tube, unfamiliarity with the technique of reversing the honing stones on the honing machine so as to improve their cutting efficiency, and unwise investment in certain expensive accessories to machines which proved not only to be useless but harmful as well to the machines and work product. Naturally most of these problems arose in the earlier chapters of performance and were solved as personnel acquired more experience. The nature of some of the early problems are described in Mr. Lee's report set forth in finding 39(b)(1), *supra*. Several of plaintiff's former employees at the Lansdale plant were called as witnesses for the defendant to testify as to their observation of inefficiencies in the operation. Their collective views centered largely on such matters as improper installation and alignment of Government-furnished machines, and faults mostly of a minor nature which they attributed to one Gromada, the plant engineer at Lansdale. The testimony of these employees is discounted to some extent, however, because of their own lack of background and opportunity for informed observation, or an impression of hostility towards the late Gromada. Moreover, it is easy to overemphasize the effect of isolated mistakes on the overall pattern and thus to give such instances undue weight. No doubt many of the plaintiff's problems arose from its inexperience, but to attribute all of them to that cause would be to ignore the effect of the inadequate Government-furnished machines which compounded plaintiff's difficulties.

42. *Delivery failures by plaintiff's subcontractors.*

(a) All Metals became delinquent in deliveries of vent assemblies to the plaintiff. Because of this arrangements were made to divert to plaintiff 140 vent assemblies being manufactured by another company for the Rock Island Ordnance Depot, 40 of them being shipped to plaintiff on May 22, 1953, and another 100 on July 22, 1953. On July 17, 1953, plaintiff advised POD that All Metals was "progressing nicely" on the subcontract for chambers and vent assemblies. Plaintiff was assisting All Metals in getting under way in its subcontract, and All Metals was objecting to the pressures being applied on it to expedite deliveries. At the same time plaintiff complained to POD that a Government inspector, by complimenting All Metals on its progress, was actually interfering with the plaintiff's efforts to stimulate All Metals to produce more rapidly, apparently on the theory that flattery promotes complacency rather than effort. By the end of July 1953 All Metals had invoiced plaintiff for only 18 vent assemblies, eight of which were subsequently rejected by plaintiff.

(b) On August 11, 1953, POD directed plaintiff to suspend further operations on the machine finishing of vent assemblies pending revision of drawings. This stop order was in force until rescinded on September 2, 1953, when POD notified plaintiff that it had decided not to make a change after all. All Metals was delayed another three weeks in September 1953 due to the failure of its steel supplier to deliver steel which complied with specification requirements. These were prime, but not sole, factors in All Metals' failure to meet its delivery schedule in August and September 1953, although Supplemental Agreement No. 7 to the prime contract referred to the stop order as having "drastically reduced Contractor's ability to make deliveries in August and in September 1953." In order to compensate for All Metals' failure, the plaintiff ordered 140 vent assemblies from the Lycoming-Spencer Division of Aveo Manufacturing Corporation. These were charged to plaintiff at higher prices than All Metals' subcontract price and were shipped to plaintiff on October 22, 1953, with the understanding that plaintiff would return them in kind out of subsequent deliveries

from All Metals, although there is no record of this having been done. The work stoppages on vent assemblies at All Metals in August and September 1953 due to the causes given above precluded deliveries of completed rifles by plaintiff to defendant in September 1953, and during that period plaintiff was accumulating completed gun barrels so that in October it was able to ship 137 completed rifles to defendant, using vent assemblies procured from Avco as aforesaid. Plaintiff's subcontractor Manalapan discontinued its operations in November 1953 for lack of funds, thus compounding plaintiff's problems.

(c) By December 5, 1953, All Metals was in such serious financial difficulties that it was unable to meet its payroll, and proposed a new delivery schedule for chambers and vent assembles at a higher price, plus a prompt payment by plaintiff of $10,000 to meet an immediate payroll in order to finish and ship about 70 chambers and 100 vent assembles then in the final stages. By then All Metals had invoiced plaintiff for a total of 261 chambers and vents. It is evident that All Metals' financial condition steadily worsened during the early months of 1954, and it was not only in trouble with its bank, but had a sizeable claim under a subcontract given it by Avco for vent assemblies under a prime contract which the Government threatened on January 18, 1954 to default, and which was in February 1954 terminated for convenience of the Government. In March 1954 All Metals was shut down for lack of cash to meet payrolls and material costs, and plaintiff was unable to pay $35,000 then owing to All Metals.

(d) In an effort to rescue All Metals and expedite deliveries, in early April 1954 the plaintiff agreed to an increase in the subcontract price and to pay All Metals $35,000 plus another $9,000 later, while All Metals promised to deliver 200 chambers and 200 vent assembles (minimum 100 of each) per month starting in May. Apparently the vents actually delivered by All Metals to plaintiff in the past were not uniformly up to specifications, for on March 31, 1954, All Metals credited plaintiff for 85 rejected vents. All Metals delivered only 18 vent assemblies in April and 578 thereafter, of which an undisclosed quantity were accepted subject to a deviation request since they failed to comply with specifications. On

April 28, 1954, the plaintiff advised POD that its failure to meet the April 1954 delivery schedule for guns was due to All Metals' failure to deliver chambers in March and April, which in turn was attributed to All Metals' financial difficulties. No reference to defective Government-furnished machines is assigned in this last-mentioned letter as a cause.

(e) All Metals attributes its difficulties to the Government's stop order and defective machines furnished by the Government through the plaintiff. While these may have been minor contributing factors, its chief difficulties were inexperience, lack of "know-how", poor management and supervision, and inadequate financing.

43. ***Conclusions.***

(a) Under the terms of the Facilities Contract, if the Government-furnished machines were delivered either late or not in fit operating condition, the plaintiff's only recourses were either to reject them or to request an equitable price adjustment in Contract 1213. The Facilities Contract precluded plaintiff from being reimbursed directly for the costs of repair, rehabilitation or restoration of the machines, or from recovering damages for their delay in delivery or delivery in unsatisfactory operating condition. It was thus incumbent on the plaintiff to estimate in advance as accurately as possible what it would cost to install and repair the machines, as well as the cost of special tooling. The difference between a repair and an item of special tooling is not always easily discernible. In general, an item of special tooling is a device which is used in conjunction with a basic machine in order to adapt it to the manufacture of a particular end product, as distinct from a component of the basic machine without which the machine will not operate satisfactorily for any purpose.

(b) Of $82,264 which defendant has verified was expended by plaintiff for dies, jigs, fixtures and special tools, the defendant concedes that $37,358.58 was properly chargeable to contract performance, because the contract provided the payment of this sum as the cost of special tooling which was to become the property of the Government. Originally the plaintiff had included $38,514 in its contract price for special tooling (estimated at $14 per rifle), which was to remain its

property, but in order to provide plaintiff with badly needed working capital the Government agreed to subtract $37,358.58 from the rifle price and set up special tooling as a separate item to be paid for, with the proviso it was to become the property of the Government. Of the $44,905.42 admittedly expended over and above the $37,358.58 which the Government concedes is properly chargeable, it cannot be determined with any precision what part was spent for installation and repairs of Government-furnished machines (the plaintiff says $27,750.48), what part was spent for special tooling in excess of that contemplated, and what part was the cost of plaintiff's inefficiency and inexperience. From the record as a whole it is reasonable to conclude that the $82,264 was expended as follows:

$12,000—repairs and installation
60,264—special tooling
10,000—lost through inefficiency

(c) From the facts presented in findings 34 through 42, and other facts in the record, it is concluded as follows:

Collectively, the condition of the machines furnished by the Government to the plaintiff did not measure up to what the plaintiff might reasonably have anticipated under the promise of the Facilities Contract to furnish machines in fit operating condition, even though the parties contemplated machines which would need repairs, special tooling and accessories to be provided at the plaintiff's expense to perform Contract 1213. Knowing that the plaintiff had had no previous experience in this particular type of operation, it would seem incumbent on the Government to have furnished it machines which, while they might require initial repairs of a normal nature to place into operation, would not require the constant tinkering and involve the repeated failures and breakdowns which were experienced with some of the machines, even leading to the replacement of certain ones at a later time. The fact that some of the machines performed reasonably well if properly operated did not permit a smooth flow of production if other machines essential to a sequence of operations broke down. The defects in the machines in many cases were not such as could be detected upon visual examination alone at the time of delivery, for the machines

had to be installed and placed into operation before certain types of defects became apparent. Thus, it was not always possible for the plaintiff to invoke its right or perform its duty under the Facilities Contract to reject defective machines upon delivery, although its complaints as to certain machines at later dates resulted in replacements. There is some support in this conclusion as to the overall condition of the machines in the continuous assistance and advice which the Government rendered to the plaintiff throughout the contract, in the generous modifications which the Government made to the plaintiff's delivery schedule, and in the apparent willingness to replace some of the machines. Reliance is also placed on the recorded complaints from the plaintiff set forth in finding 39(b), *supra*, the contents of which are not refuted or responded to by contemporaneous communications from the Government. It is true that the troubles which the plaintiff experienced in the operation of the machines were compounded by certain inadequacies in their installation (finding 38, *supra*), and to a larger extent by the demonstrated inexperience and incompetence displayed by plaintiff's personnel in the installation and operation of such machines for the production of gun barrels (finding, 41 *supra*). Moreover, All Metals' failure to deliver subcontracted components (finding 42, *supra*) was at least of equal significance in the delays which plaintiff experienced and, of course, they are imputed to the plaintiff. To some extent the delays coexisted, so that even if the plaintiff had experienced no delays from defective machines, it would have been delayed by the failures of its subcontractors. There is no way to assess accurately the comparative effect of the various delay factors in terms of time or cost, but it is reasonable to conclude from the weight of the evidence that the defendant caused one-third of them and the balance was caused by plaintiff either directly or by imputation.

44. *Plaintiff's requests for reimbursement for machine repair costs.*

(a) Section 1 of Article II–A of the Facilities Contract (see finding 35, *supra*) authorized the contracting officer to make an equitable adjustment of the price and time of performance of the affected supply contract if the Government-

furnished facilities were not delivered timely or in suitable condition and if the contractor requested such an adjustment in writing. Prior to cancellation of Contract 1213, the plaintiff wrote to POD at least twice requesting reimbursement in one form or another (outright payment or renegotiation cost allowances) for specified costs allegedly in connection with putting the Government-furnished machines in working condition. See the letters reprinted in subparagraphs (2) and (6) of finding 39(b), *supra*. On August 26, 1954, plaintiff asked POD for reimbursement for all parts which plaintiff had purchased to make the machines workable, and on September 7, 1954, plaintiff supplied POD with schedules itemizing the cost of parts purchased for the machines and requesting "assurance that the monies represented herein will be paid to us." The total amount claimed was $28,646.41.[4] POD replied that it would take these requests under consideration and would advise plaintiff of a decision. After being prodded by the plaintiff for a decision, on October 28, 1954, POD advised plaintiff that "should future developments absolve your company of any wrongdoing and this District be authorized to effect a settlement with your company that we will at that time give full consideration to your claim for said expenditures along with any other termination claims you may allege as being brought about as a result of the cancellation of your contract." The defendant contends that plaintiff at no time during the period of contract performance requested an equitable adjustment in the contract price because of problems with Government-furnished machines, a contention which is accurate only if the written efforts for reimbursement made by plaintiff as related above are not construed to be equivalent to a formal request for an equitable adjustment. It is found, however, that the letters referred to above did amount in fact to a request for an equitable adjustment.

CONSEQUENCES OF PLAINTIFF'S PRODUCTION DELAYS

45. *Time Extensions.*

(a) The composite schedule in finding 14, *supra*, reflects the original delivery schedule for rifles and accessories as

[4] A subsequent document gives this figure as $27,750.48.

amended by Supplements 3, 7 and 9 to the contract, against the actual deliveries, which when analyzed demonstrates that against the revised requirements the plaintiff was delinquent in deliveries during all but the first two of the 15 production months from April 1953 to July 22, 1954, when the contract was canceled,[5] and that the delinquencies ranged from 8 to 237 rifles and stood at 118 rifles at the time of cancellation, viz:

	Contract Revised Schedule	Actual Deliveries by plaintiff	Cumulative + or −
April 1953		2	+2
June 1953	30	30	+2
July 1953	125	2	−121
August 1953	0	113	−8
September 1953	60	0	−68
October 1953	133	137	−64
November 1953	133	100	−97
December 1953	100	62	−135
January 1954	100	106	−129
February 1954	100	100	−129
March 1954	100	49	−180
April 1954	100	43	−237
May 1954	100	104	−233
June 1954	100	180	−153
July 1954	100	[1] 135	−118

[1] To July 22, 1954, when the contract was canceled.

The details of the time extensions granted and the need and requests therefor are presented in the succeeding paragraphs of this finding.

(b) Prior to award of the contract the plaintiff estimated that it would take about ten weeks to install the machine tools to be furnished by the Government and would commence production about March 15, 1953, so that it could meet the initial delivery requirement of 74 rifles in May and 233 each month thereafter to completion. Due to the causes already described the plaintiff had delivered only 324 rifles by the end of June 1953.

(c) On June 18, 1953, the plaintiff submitted for approval to POD a revised delivery schedule (see finding 39(b)(3), *supra*), which postponed initial deliveries to June and which would "enable us to complete our contract within the original completion period." The request attributed plaintiff's lack of deliveries to the Government's failure to furnish ma-

[5] These were, of course, cumulative delays. The delivery schedule shows that in six of the 15 months of contract performance the plaintiff exceeded the revised requirements *for that month*.

chines in sufficient time and in proper condition, and plaintiff said that it would request no further extensions because it had by then sufficient Government-furnished machinery on hand to perform. On the same day POD approved the revised schedules and on August 11, 1953, the parties entered into Supplemental Agreement No. 3, antedated January 27, 1953, under which the quantities in the original contract were increased by 429 rifles and some spare parts and the delivery schedule was revised to conform to the schedule which the parties had agreed to on June 18, 1953. Supplemental Agreement No. 3 read in part as follows:

> WHEREAS, the parties have agreed to increase the quantity of Rifles (Item 1) to be delivered by 429 units and to add Spare Parts for same; and
>
> WHEREAS, the price for the Spare Parts shall be subject to Price Redetermination (Form IV) after complete delivery of same; and
>
> WHEREAS, the Contracting Officer has found and determined that the Contractor is entitled to a change in the delivery schedule applicable to the original contract item because the Government-owned facilities were delivered to the Contractor; and
>
> WHEREAS, the Contracting Officer has found and determined that due to late deliveries of Government facilities under Contract No. DA-36-034-ORD-1214 and the need for excessive repairs thereto, the Contractor is entitled to a change in the delivery schedule on subject Supply Contract;
>
> * * * * *

One effect of this time extension was to relieve plaintiff of liability for non-delivery of 275 rifles by the end of June 1953 as per requirements of the original contract.

(d) On September 1, 1953 (All Metals' production of vent assemblies had been stopped since August 11 by a stop order from POD pending a proposed change in finishing specifications) the plaintiff submitted to POD a proposed further postponement of the delivery schedule for rifles, which was withdrawn on October 16 when plaintiff substituted another schedule further postponing early deliveries but accelerating the completion date, citing as reason the failure of vent assembly deliveries from All Metals due to a stop order and steel supply problems. On October 21, 1953, plaintiff again submitted to POD another proposed revision of the delivery

schedule which was the same as that proposed on October 16 but eliminating from the latter deliveries for December 1953, citing as reason the unserviceable condition of certain machines furnished by the Government (see finding 39(b)(4), *supra*).

(e) By the end of November 1953 plaintiff was in arrears of delivering 703 out of 1,087 rifles required by the revised delivery schedule agreed to on June 18, 1953, and incorporated in Supplemental Agreement No. 3. It delivered 100 rifles in November and 62 in December 1953. Plaintiff was rightly concerned about the prospect of being charged penalties for non-delivery under the liquidated damages provision of the contract and was proposing that the clause be deleted. Instead, POD on December 17, 1953, advised plaintiff that such a proposal would require action by higher authority, and that in the meantime it contemplated reducing the delivery schedule requirements to 100 rifles per month at no increased cost to the Government. Said POD: "This should be a delivery schedule which you can make and if you do make it the penalty clause will not take effect. As you can see, this then would have the same effect as removal of the penalty clause." As will be seen in the next paragraph of this finding, Supplemental Agreement No. 7 to the contract which was the ultimate form of the next official time extension did not have the effect of waiving late deliveries of rifles required to be delivered prior to August 1953 under Supplemental Agreement No. 3.

(f) Supplemental Agreement No. 7, dated January 27, 1954, further revised the delivery schedule. Its effect was to require the delivery of 481 rifles by the end of November 1953 (by which time plaintiff had delivered 384 rifles), and 100 per month thereafter, thus relieving plaintiff of liability for 1,105 rifles which, by the end of January 1954, were in default under the revised schedule in Supplemental Agreement No. 3.* The reasons assigned by Supplemental

*The defendant erroneously stated in its requested finding No. 39 (to the Commissioner) that Supplemental Agreement No. 7 revised the picture of actual v. required deliveries, so that as of November 30, 1953, the plaintiff had delivered 384 rifles and was required to deliver 326, and the plaintiff employs this erroneous computation as a basis of demonstrating that plaintiff was not delinquent up through March 30, 1954. The error made by plaintiff is in not recognizing the fact that Supplemental Agreement No. 7 did not effect a change in the then existing delivery requirements for the months prior to August 1953.

Agreement No. 7 for the modification of delivery requirements were as follows:

WHEREAS, the Contractor was directed by the Government on 11 August 1953 to suspend the finish machining operation of breech lock vent openings pending revision to Drawing C7229964; and

WHEREAS, said stop order has since been revoked; and

WHEREAS, said stop order drastically reduced Contractor's ability to make deliveries in August and in September 1953; and

WHEREAS, the deliveries required of the Contractor for the months of October and November 1953 were cut to 133 per month by a Government directive from Watervliet Arsenal; and

WHEREAS, the Government has further ordered that beginning with December 1953 the minimum monthly deliveries shall be at 100 units till completion of contract; and

WHEREAS, the parties have agreed that the delivery schedule in the contract shall be revised to reflect the above at no change in contract price.

(g) Prior to cancellation of Contract 1213, the defendant considered the possibility of a termination for default, but concluded that "the delinquent delivery of items could be considered excusable or corrected by the contractor within a ten-day period."

46. *Liquidated Damages.*

(a) On December 16, 1953, the plaintiff requested POD to eliminate from Contract 1213 the Liquidated Damages provision, quoted in finding 15, *supra*. On December 17, 1953, POD advised plaintiff that its request was beyond POD authority and required action by higher headquarters, where its approval would be unlikely. As an alternative POD mentioned the possibility of a substantial modification of the delivery requirements which, if plaintiff would meet the changed schedule, "would have the same effect as removal of the penalty clause [i.e., liquidated damages clause]." This modification was later adopted in the form of Supplemental Agreement No. 7 of January 27, 1954, described in finding 45 (e) and (f), *supra*.

(b) Supplemental Agreement No. 7 was the last modification of the delivery requirements for rifles prior to the suspen-

sion of Contract 1213 on July 22, 1954. During the performance period the plaintiff delivered a total of 1,163 rifles. Late deliveries by plaintiff under the delivery schedule as ultimately revised by Supplemental Agreement No. 7 resulted in an assessment of liquidated damages of $55,568.25 on Item 1 (rifles) and $747.83 on Item 2 (accessories), or a total assessment for liquidated damages of $56,316.08. Liquidated damages deducted from the payments made to plaintiff for delivered items totaled $53,715.19, of which $1,700.34 represents an erroneous overcharge. Recomputation of the liquidated damages schedule indicates another overassessment of $286.53 for which the Government has not given the plaintiff credit.[7] Liquidated damages applicable to items delivered by plaintiff but for which no payments have been made by the Government total $4,301.23.

(c) On May 20, 1954, the plaintiff addressed a letter to the Comptroller General through POD which may be fairly construed not only as a complaint over the presence in the contract of a liquidated damages clause but also as a request that it be relieved of the assessment of liquidated damages either by forgiveness or by deletion of the clause. Plaintiff's contention therein that the inclusion of the clause in the contract was contrary to the preaward oral agreements is not supported by evidence. The letter contains no reference to the effect of Supplemental Agreement No. 7 as a mitigant of liquidated damages. There is also a puzzling inference that the reduction of the monthly delivery schedule to 100 without a 5 percent increase in unit prices for the stretched-out deliveries was an imposition on the plaintiff, although the reduction in delivery requirements actually conferred a substantial benefit on plaintiff by forgiving most of its past delinquencies and corresponded more realistically to the average of plaintiff's erratic production record to that time. On May 28, 1954, POD accepted plaintiff's letter of May 20 as an appeal for relief from liquidated damages but

[7] Despite the fact that the plaintiff conceded the mathematical correctness of the liquidated damage schedule placed in evidence by the defendant, the court has corrected mutual mistakes. Thus, the $286.53 error referred to involves the requirement of the revised delivery schedule that 100 rifles be delivered in March instead of 102 on which the defendant's computation erroneously is based. This affects the liquidated damages chargeable for March 1954 and subsequent months.

held it in abeyance instead of processing it to the Comptroller General, advising plaintiff that the appeal was addressed to equitable rather than legal considerations and thus would not be cognizable by the Comptroller General. On June 21, 1954, plaintiff advised POD that, if it could not be relieved of liquidated damages by the Ordnance District, then it wished its earlier request for such relief to be forwarded to the Comptroller General. There is no record of the plaintiff's letter of May 20, 1954 ever having been forwarded to the Comptroller General by POD. Beyond the documents referred to or quoted from in this report, there is no record that the plaintiff at any time after January 25, 1954 filed with the contracting officer a specific request for a decision by the latter of the causes of plaintiff's delay in deliveries either under the liquidated damages or the disputes clauses of Contract 1213.

CONTENTIONS AS TO CAUSES OF CONTRACT CANCELLATION

47. *Cancellation.* On July 22, 1954, POD directed plaintiff to suspend all production under Contract 1213, emphasizing that the order was not "to be construed as a termination of this contract either for convenience of the Government or for default." On August 18, 1954, POD notified plaintiff that Contract 1213 was canceled for unspecified "statutory violations", and that since these alleged violations and their effect on the Government's rights under the contract were under study by the Army and the Department of Justice any future payments would be "handled in accordance with procedures for handling claims of a doubtful nature arising under such contracts." In essence, the plaintiff contends that the defendant's prime but unadmitted motivation in canceling the contract was the discontinuance of military requirements for the 75 mm. rifle as an obsolete and superseded weapon, and that POD's excuse of "alleged statutory violations" was a convenient pretext to avoid the high costs prospectively attending a termination for convenience of the Government. The status of requirements for the rifle as well as the status of defendant's knowledge of statutory violations as they existed on July 22, 1954, thus become pertinent subjects of inquiry in order to determine their causal relationship to the cancellation.

48. *Need for 75 mm. rifles.* On June 16, 1954, the office of the Chief of Army Field Forces questioned the effectiveness of the 75 mm. rifle and requested permission from the Assistant Chief of Staff, G–3, to eliminate it from the Army weapons system. On June 17, 1954, G–3 approved the request submitted by the Chief of the Army Field Forces. Between then and July 6, 1954, an officer from the office of the Assistant Chief of Staff, G–4, requested Lt. Colonel Martin Raines to estimate the cost to terminate production of the 75 mm. rifle, then being produced only by plaintiff. This was the first knowledge by the Ordnance Corps that the Army staff level was considering the elimination of the 75 mm. rifle. On July 6 or 7, 1954, the Ordnance Corps received a directive from G–4, dated July 2, to take steps to terminate production of the 75 mm. rifle. The Ordnance Corps did not agree with this decision and General Medaris authorized Lt. Colonel Raines to endeavor to obtain a reversal. The Ordnance Corps' reasons for not wanting to terminate production of the weapon were two-fold: the high cost of termination (estimated at $300,000), and the belief that the BAT 106 rifle, which was to supersede the 75 mm. rifle, was not sufficiently advanced in production to warrant phasing out the 75 mm. rifle. Because plaintiff had an outstanding V-loan, it was necessary to obtain financial coordination with the Chief of Finance before deciding upon termination for convenience. Accordingly, a financial coordination conference was held on July 15, 1954, and on July 16, 1954, the Ordnance Corps requested G–4 if it should still proceed with the prior directive of July 2, 1954, to terminate procurement of the 75 mm. rifle. Meanwhile, Lt. Colonel Raines, with General Medaris' knowledge, had held a series of verbal discussions with G–4 to persuade the retention of the 75 mm. rifle in the weapons system. By communication dated July 21, 1954, G–4 reaffirmed the decision to cancel production of the 75 mm. rifle, and thus ended the Ordnance Corps' efforts to retain the weapon. The final decision by G–4 to deny the Ordnance appeal and to terminate production on the 75 mm. rifle was thus reached after General Medaris' decision on July 13, 1954 to cancel Contract 1213 because of plaintiff's activities that were suspected of fraud.

49. *Precancellation intelligence of contract irregularities.* Between April and July 1954 the Federal Bureau of Investigation received, investigated and reported information relating to the Gunn Engineering Company (findings 20 and 21, *supra*), and the kick-back activities of certain of the plaintiff's subcontractors as described in findings 18 through 25. This information became known to the Ordnance Corps and was discussed between General John B. Medaris, then Assistant Chief of Ordnance and Chief of its Industrial Division, and Albert C. Lazure, General Counsel of the Ordnance Corps. Mr. Lazure had previously learned in December 1953 that plaintiff had hired Tucker, Jr., for he had seen the copy of Tucker's employment agreement filed by plaintiff with the Rock Island Arsenal in connection with plaintiff's Ordnance Contract 9580 (see finding 8(b), *supra*). This background information, plus the data from the FBI investigation, was augmented by additional information resulting from an investigation in progress by the General Accounting Office into the general contingent fee activities of the Tucker father and son associates.[8] General Medaris and Mr. Lazure had received reports collectively concerning the payment of gratuities by plaintiff to Government employees, the charging of personal expenses to the contract, the plaintiff's excessive requirements for technical assistance from Watervliet Arsenal, and plaintiff's inability to operate Government-furnished machines which Ordnance considered to be adequate in qualified hands. They had formed the impression that the situation had begun to "smell bad" and had the "flavor of contractual irregularities". These matters were the subject of a conference held on or about July 12, 1954, between General Medaris, Lt. Colonel Raines and Mr. Lazure, at which the latter advised that from a legal standpoint the plaintiff's contract could be canceled for its activities in violation of statutes relating to contingent fees, kickbacks, false claims and conspiracy, as well as common

[8] Plaintiff correctly contends that the record is not specific as to the precise source and scope of the Ordnance Corps' knowledge prior to July 22, 1954, of data developed by the FBI and GAO. It is clear, however, that officials of the Ordnance Corps had enough knowledge to arouse their suspicions, and if the later perfection of their knowledge were to have legally justified their cancellation action, then the only point to the plaintiff's objection would go to the determination of the controlling motive for cancellation at the time.

law fraud. As a preliminary to cancellation the following teletype message was sent by Ordnance to Watervliet Arsenal on July 13, 1954:

> Re Contract DA-36-034-ORD-1213R. Information received by this office indicates possibility of contract irregularities concerning certain individuals associated with Acme Coppersmithing. In view thereof contractor should be notified immediately that Government will not accept any additional rifles produced by Acme. Inspection and acceptance of items manufactured by this contractor should stop immediately. Detailed instructions will be forwarded your arsenal outlining the method to be followed in cancelling this contract. Under no circumstances will this contract be terminated for either convenience or default.

On July 21, 1954, the following teletype message was sent by Ordnance to Watervliet Arsenal:

> * * * Take immediate action to effect work stoppage pursuant to referenced TT. Detailed instructions will be forwarded your arsenal outlining the method to be followed in cancelling the contract. Under no circumstances will contract be terminated for either convenience or default.

The actual suspension itself occurred on July 22, 1954, as described in finding 47, *supra*.

50. *Conclusion as to cause for cancellation.*

(a) It is reasonable to conclude that as of July 22, 1954, there existed simultaneously two reasons of equal validity in the view of the Army to cancel Contract 1213: the termination of military requirements for the 75 mm. rifle, and the suspicion of plaintiff's fraud, with particular emphasis on the Gunn Engineering Company situation, as related in findings 20 through 25, *supra*. Either one of these reasons would have resulted in cancellation in absence of the other, but each was arrived at independently. Whether right or wrong, the election by the Army to cancel the contract for alleged statutory violations instead of terminating it for convenience of the Government was not controlled by considerations of termination costs, but rather by the Army's interest in promoting morality in public procurement. The time sequence of events described in findings 48 and 49 bears

out this conclusion. There was a calculated risk in the Army's election to cancel for cause, for if the grounds proved to be invalid the Government would then face the risk of ultimately paying damages for breach of contract, a cost conceivably greater than the allowances provided under the normal termination for convenience formula. And if the grounds were ultimately valid so that the plaintiff would forfeit any recovery, the plaintiff's resultant financial predicament would jeopardize the security of its V-loan underwritten by the Government, and accordingly cause the Government a prospective loss.[9] It is, of course, obvious that, had it not been for the termination of the Army's requirements for the 75 mm. rifle, the defendant might have elected to take over the contract and complete it, but it is not clear that this would have benefited plaintiff.

(b) All Metals was suspended from the Army list of eligible bidders as a result of its "implication in the fraudulent situations", but plaintiff was not. Plaintiff's counsel was advised in January 1956 by POD that it was not considered to be in disrepute in Government circles. The criminal indictment against Tucker, Norris and Epstein for conspiracy alleged in pertinent part as follows:

> 5. It was the plan and purpose of the said conspiracy that James Samuel Norris and Harry King Tucker, Jr., defendants, would utilize, take advantage of, and trade on their positions as employees of Acme to approach persons who sought subcontracts and orders from Acme for supplies, materials, equipment and services to be used by Acme in the performance of the above mentioned prime contract, and to solicit fees, commissions, gratuities and compensations from such persons as an inducement for the aid of the defendents in obtaining and procuring the award of such subcontracts and orders.

PRICE REDETERMINATION

51. *Contract provisions.* Provisions of Contract 1213 relevant to price redetermination provided ultimately that, after completion of delivery of 30 percent of the rifles, the prices of rifles and spare parts could be increased retrospectively and

[9] The proof required to attribute base motives to responsible military and civilian officials of the Department of Defense should be at least as conclusive as that required to establish fraud on the part of a Government contractor.

prospectively to a ceiling of 115 percent of contract target price, and the prices of accessories, tools and equipment which plaintiff was to manufacture could be increased to a ceiling of 110 percent of contract target price. The redetermined prices were to be reached after negotiations based upon submission of data by plaintiff, all as prescribed in the relevant contract provisions. The data was to be submitted by plaintiff within 30 days after 30 percent of the rifles had been delivered. The target and ceiling prices (as revised) are as shown in the following schedule:

Item No.	Description	Ceiling	Target Price		Maximum Price	
			Total	Per Unit	Total	Per Unit
		Percent				
1	Rifles	115	$366,123.53	$315.37	$808,347.87	$362.90
2	Accessories	110	73,488.00	26.71	80,836.80	29.38
3	Spare parts	115	64,812.34	23.56	74,534.19	27.09
4	Special tooling	110	37,358.58		37,358.58	
					1,191,077.44	

52. *Submission of allegedly false claims via price redetermination.*

(a) On July 23, 1953, by which time plaintiff had delivered only two rifles out of 2,751, POD requested plaintiff to submit cost data for price redetermination purposes. Plaintiff promised to provide the data by November 27, 1953. Not having received it, POD renewed its request on December 4, 1953, in response to which the plaintiff wrote that it would furnish the data in March 1954 by which time it expected to have completed the 30 percent of deliveries prerequisite to price redetermination proceedings. On April 29, 1954, plaintiff submitted statements reflecting its cost of performance of $1,179.29 per rifle through December 31, 1953,[10] and its estimated cost to complete of $453.31 per rifle, compared to the contract ceiling price of $362.90. The costs submitted by plaintiff include all of its unanticipated costs such as those for delay.

(b) The schedules accompanying plaintiff's submission of cost data on April 29, 1954 contained without specific designation certain cost items which the defendant contends were

[10] 446 rifles had been delivered by December 31, 1953.

false claims for expenditures not properly chargeable to performance of Contract 1213, viz:

(1) Subcontract costs of All Metals, Manalapan, Nicholson Products Company and Foley Machine Company which included a 5 percent allowance for the services rendered the subcontractors by Tucker and/or Norris in procuring the subcontracts from plaintiff, as related in findings 18 through 25, *supra*.

(2) The $12,000 inflation in All Metals' subcontract price to plaintiff involving the Gunn Engineering Company, as related in findings 20 and 21, *supra*.

(3) The $470 plus hotel expenses paid by plaintiff to Mr. Lee, an employee of Watervliet Arsenal, for his services, as related in finding 33, *supra*.

(4) The $1,045.52 charged by Norris against Contract 1213 for services rendered by plaintiff's employees on Norris' farm, as related in finding 26, *supra*.

(5) Minor hotel, meal and entertainment charges for Government employees, including Hochstuhl, as related in finding 32, *supra*.

(6) Payments of salaries and/or commissions to Tucker by plaintiff.

The cost data was submitted for purposes of price redetermination, and the contract ceiling price was vastly less than the plaintiff's actual costs per unit even with the exclusion of the costs which defendant contends were not properly chargeable to the contract. Moreover, by letter of July 16, 1954 (six days prior to contract cancellation), the plaintiff's accountant advised POD of the reason why he could not certify the costs submitted on April 29, 1954, and that he had not corrected certain errors that he knew plaintiff had made in charging costs to the contract because the errors would be relatively small and, even if eliminated, would leave plaintiff with costs greatly in excess of the contract ceiling price. The Army Audit Agency audited the plaintiff's cost submission but its report is not in evidence.

(c) On July 16, 1954, the plaintiff's accountant submitted to POD plaintiff's cost data on rifles for the period January 1, 1954 to June 30, 1954, showing a cost per gun of $690.21 even after elimination of certain direct costs, cost of tools

and dies, and miscellaneous expenses. Plaintiff's accountant again said that he could not certify the costs as being entirely accurate because he was not present at the taking of physical inventories, but felt that the costs submitted were essentially correct. The per unit cost was so greatly in excess of the contract price that the Army Audit Agency felt it was not necessary to audit the plaintiff's costs for this later period. On July 16, 1954, the plaintiff certified that it had negotiated a repricing settlement agreement with the defendant's representatives whereby the contract price of rifles was increased to the contract ceiling price of $362.90 each, subject to approval of the contracting officer, which approval was never forthcoming because the contract was canceled in the meantime. However, on July 28, 1954 (six days after contract suspension), the defendant's Board of Awards approved the increase of rifle prices to the contract ceiling price, basing its decision on the recommendation and reasons of the defendant's Price Analyst who had reported that the ceiling price was less than that of any other producer of the item.[11]

(d) Under date of April 11, 1955, Army Ordnance advised GAO that because of the price redetermination possibility which apparently was still alive, the Army was reserving $54,894.22, which was in addition to $21,411.64 being held for possible use in payment for items delivered prior to cancellation, in the event plaintiff's claim was not subject to forfeiture. At this time Army Ordnance had been given interim advice by the Department of Justice that no civil or criminal cause of action lay against plaintiff, and Ordnance was seeking the advice of GAO as to whether the cancellation for cause action of July-August 1954 could be converted into a termination for convenience of the Government, thus indicating a prevailing uncertainty on the part of Army Ordnance as to the legal sufficiency of the grounds upon which the contract had been canceled for cause.

RETURN OF GOVERNMENT PROPERTY

53. (*a*) *Plaintiff's refusals to return property.* On August 25, 1954, POD notified plaintiff that it intended to remove

[11] It would appear that the Board of Awards was not aware that the contract had been suspended six days earlier, for their action was superfluous in the then existing circumstances.

all government machine tools and equipment in plaintiff's possession under Facilities Contract 1214, and requested permission to send a packaging contractor to the Lansdale plant to prepare the property for shipment. On August 26 plaintiff instructed its subcontractors not to release any machinery or tools to the Government and notified POD as follows:

> * * * The matter which you suggest in your letter is not quite as simple as the two paragraphs you have written. First, before withdrawing any Ordnance owned machine tools and equipment now in our possession, we wish to be reimbursed for all parts that were purchased personally to make the machines workable under both contract numbers. We have a complete list of all gears, tables and extra necessary fixtures for each and every machine. It would be foolhardy to pack these machines and strip them of the necessary working parts, which was done by the Government previously when we took in the Ordnance owned machine tools and equipment.
>
> After the evaluation has been established and OK'd for payment, we do not see any need for sending in an Ordnance Packaging Contractor for the purpose of removing the Government equipment, since we are definitely capable of doing same.

On September 7, 1954, plaintiff wrote the following to POD:

> Enclosed please find two copies of parts that were purchased for the various machines rented to us by the Government.
>
> As pointed out to you in a previous letter, the parts contained herein were the necessary pieces of equipment required to make the machines functional and were missing upon receipt of the various machinery shipped us. As explained to you over the telephone, the monies shown on the individual sheets were the actual out-of-pocket expenditures on our part. Before shipping the apparatus, as per your instructions, we would appreciate assurance that the monies represented herein will be paid to us.

Findings 36, 39 and 40, *supra*, describe the machines and the repairs and additions made to them by plaintiff. POD promised to take plaintiff's request for reimbursement under consideration and renewed its request for permission to enter plaintiff's plant and prepare the machines and other Govern-

ment property for shipment. Plaintiff expressed its willingness to comply with POD's request if given suitable assurances of reimbursement, to which POD responded on October 28, 1954 that since cancellation of the contract it lacked authority to pay or promise to pay, but that "should future developments absolve your company of any wrongdoing" the claim for reimbursement would be considered along with plaintiff's other termination claims.

On November 5 plaintiff briefly granted permission for POD to remove the machines, but before this could be done the plaintiff reimposed the prohibition on November 10 because of a purported lack of cooperation on the part of the defendant in entertaining plaintiff's claims. In effect plaintiff wanted a *quid pro quo*, and believed that "the only way any consideration will be given this company is if we adopt the same measures the Government is adopting with us."

(b) *Plaintiff authorizes removal.* The Government prepared to file suit to recover its machines and tools, and on February 2, 1955, the plaintiff voluntarily capitulated by authorizing the Government to remove its equipment, requesting "a reciprocal spirit of cooperation on the part of the Army" in the form of money because of plaintiff's threatened bankruptcy and its "desperate need of immediate assistance." Arrangements were made to remove the property commencing February 10, 1955, and on February 7 POD advised plaintiff as follows:

> Previous inspection of Machine Tools at your plant has indicated that the majority were equipped with contractor owned accessories and tooling, such as special heads, guides, bearings, motor controls, gages, etc. Since the Government cannot be responsible for this property after removal of equipment, it is recommended that it be removed prior to plant clearance date.

On February 9, 1955, POD advised plaintiff as follows:

> This will confirm telephone conversation today concerning removal of contractor-owned accessories and tooling from Government-owned machine tools. Since you have indicated that you will be unable to remove this Contractor-owned equipment prior to plant clearance date, it is agreed that E. A. Gallagher and Sons will undertake this task. It is understood, however,

that since the Government is relieving your Company of this work, any property damage incident to this removal will be at Contractor's risk and that the Government and/or E. A. Gallagher and Sons will be relieved of any liability.

(c) *Removal from All Metals accomplished.* Arrangements were also made in January and February 1955 to remove Government property from the premises occupied by Manalapan and All Metals, and a removal was accomplished from All Metals' plant without delay.

(d) *Counterclaim for unreturned property.* After the Government had regained possession of its machines and certain special tooling which had become Government property by virtue of contract provisions (Clause 36 of General Provisions, and Supplemental Agreement No. 6), there remained unreturned some additional tooling as to which plaintiff admits liability in the amount of $6,205.55, which is the subject of a counterclaim by the defendant. In view of the plaintiff's admission of liability it is not essential to mention that the additional tooling was apparently at the time on the premises occupied by Manalapan (which Manalapan denied) and became the subject of a protracted but fruitless exchange of correspondence between the parties from February 1, 1956 to July 12, 1956, in an effort to recapture the tooling or its value.

(e) *Counterclaim for scrap.* The plaintiff also concedes liability for the defendant's counterclaim in the amount of $1,117.94, representing the scrap value of gun tubes furnished plaintiff by defendant, and in plaintiff's possession at time of contract cancellation.

POST-CANCELLATION ADMINISTRATIVE PROCEDURES (OTHER THAN PRICE REDETERMINATION)

54. *Recital.*

(a) On November 15, 1954, Mr. Lazure, General Counsel of the Ordnance Corps, advised the Army Judge Advocate General of the circumstances which induced cancellation of Contract 1213, and then stated as follows:

4. Subsequent to the cancellation, Acme presented a plan for payment in order that a V-loan obtained by the Company could be liquidated by approximately

$85,000. In this regard, this office, consistent with the practice of securing advice from your office and the Department of Justice in matters concerning fraud or suspicion of fraud, requested advice on the possibility of making payments to liquidate the V-loan balance. Reference b. advises that the Department of Justice has considered the matter and determined that no objection would be raised provided there is a prior execution by Acme of an agreement that acceptance of the proposed plan of payment would be without prejudice to any rights of the Government arising out of this case.

5. This office has considered the entire matter concerning payments to Acme Coppersmithing under Contract Ord-1213R and has determined that it would be consistent with the original decisions of this office concerning cancellation of this contract and decisions of the Comptroller General as indicated above to recommend no further payments to this Company until such time as the matter under consideration by the Department of Justice has been concluded.

(b) Plaintiff's representatives repeatedly requested Mr. Lazure to expedite action on the release of contract funds. By December 15, 1954, the Department of Justice had advised the Army Judge Advocate General that, although it had not completed its study, it believed that the only civil fraud action that would lie against plaintiff would be the possible withholding of $15,000 under the Anti-Kickback Act, and it had concluded that no criminal prosecution of Acme (as distinct from other firms and individuals) would be warranted. On December 15, 1954, Mr. Lazure gave a status report to General Medaris which closed with the following recommendation:

* * * Inasmuch as the Department of Justice has made certain determinations with respect to Acme and it now appears that action will not be entertained against the Company, it is suggested that prior to closing this case by the Ordnance Corps, in light of the decision of the Department of Justice, the Ordnance Inspector General be requested to make a complete review of this matter. In the past the Ordnance Inspector General has conducted considerable investigations concerning this matter at the Philadelphia Ordnance District. A complete review of the situation by the Inspector General will provide a basis whereby the Ordnance Corps may in all fairness to the contractor and in the interest of the

Government make final decisions as to the disposition of this case.

(c) On December 16, 1954, at Mr. Lazure's recommendation, General Medaris advised plaintiff's attorneys that plaintiff could file a claim with the General Accounting Office.

(d) On March 8, 1955, General Medaris summarized the complex situation for the Army Judge Advocate General. After claiming that its position was legally sound and that plaintiff could apply to the General Accounting Office for relief, the Ordnance Corps document stated as follows:

> Although it is considered questionable by this office that payment can be made under a cancelled contract, and in light of 28 U.S.C. 2514 the question of payment for items delivered prior to cancellation has been resolved in favor of the contractor by preparing vouchers for those items and submitting same through appropriate channels to the General Accounting Office for direct settlement. In addition, the record of price redetermination of items delivered prior to cancellation and recommendations thereto will be submitted to the General Accounting Office for direct settlement.
>
> * * * * *
>
> Here again, attention is invited to the forfeiture or fraudulent claim statute 28 U.S.C. 2514 * * * as indicated * * * it is the position of the Ordnance Corps that the cancellation of subject contract should stand and the contractor should be left to his legal or administrative remedy.

The memorandum also stated at another point as follows:

> * * * In addition, there was a possibility that the matter could come within the purview of the Federal statute which prohibits kickbacks (41 U.S.C. 51). However, since this contract was fixed price with price redetermination, a decision as to whether this type of contract can be construed to be a cost reimbursement contract has to be made. It is the understanding of this office that the official position of the Department of the Army is that contracts of this nature are not to be construed as cost reimbursement.

Following out the statement of intention in the foregoing document, on April 22, 1955, the Army submitted to the General Accounting Office vouchers for rifles shipped by plaintiff prior to cancellation in the net amount of $18,810.75 (after

deductions totaling $9,969.02 and a credit of $1,700.34 for an overassessment of liquidated damages).

(e) In a communication dated April 11, 1955, to the General Accounting Office, Mr. Lazure recited the background of the case, stated that the Department of Justice had advised the Army that no civil or criminal cause of action existed against plaintiff (not so as to other firms or individuals implicated and still under investigation), mentioned that POD was reserving certain funds totaling $76,305.86 for claims including price redetermination claims if they were eventually to be allowed, and then stated as follows:

> 5. In connection with the cancellation of subject contract, this office at the instance of Dep Log and OJAG is preparing a draft of a submission for the signature of the Assistant Secretary of the Army to the Comptroller General requesting a determination as to whether the cancellation of this contract for cause under the common law can be converted to a termination for convenience of the Government in the event the matter concerning this contractor and subcontractor as well as the individuals concerned is concluded by the Department of Justice. * * *.

(f) On June 2, 1955, the Army wrote to the General Accounting Office requesting advice as to the propriety of treating the rescission or cancellation of Contract 1213 as having been terminated for convenience of the Government for the purpose of determining the rights and obligations of the parties. In this communication the Army discussed at some length the prerequisites, ramifications and legal considerations involved in termination for convenience of the Government, termination for default, and rescission or cancellation for irregularities, with particular emphasis on the latter. It is evident that at this point the confidence on the part of the Army in the correctness of its action in canceling Contract 1213 was seriously undermined by the advice of the Department of Justice that "neither civil action nor criminal prosecution against Acme or All Metals, Inc., a subcontractor, is warranted.", although prosecution against certain employees of Acme had been recommended. The letter also mentioned that the Army had already sent to the General Accounting Office for direct settlement a voucher presented by plaintiff for $18,810.75 covering items delivered prior to

contract cancellation, and a request for reimbursement of $54,394.22 for a price redetermination negotiation.

(g) As of August 29, 1955, the General Accounting Office felt that its information concerning the claim was not sufficient to render the Army the advice sought by the latter in its request of June 2, 1955, and it had undertaken an investigation of its own. It is not known how much of the information in the possession of the Army and its component organizations had been made available to the General Accounting Office by this time. The Army was apparently considering the idea of converting the cancellation action into a termination for convenience of the Government, withholding from termination payments a sum to cover "the maximum possible adjustment due the Government under the covenant against unauthorized commissions or fees paid or agreed to be paid for securing the Government contract," and then permitting the Armed Services Board of Contract Appeals to rule upon the withheld items on application by plaintiff.

(h) The General Accounting Office conducted a comprehensive investigation of the "five-percenter" activities of the Tucker father-and-son team covering not merely their employment by the plaintiff, but their participation in the procurement of 35 Government contracts for 19 firms starting in early 1951. On March 16, 1956, the Comptroller General furnished the Secretary of the Army an extensive report covering the Tucker activities referred to. There were many similarities and some differences in the arrangements between Tucker, Jr., and the plaintiff on the one hand, and between the Tucker group and various other companies in the Government contract field. The Comptroller General reported what seem to be parallels in the type of employment contracts the Tuckers entered into with their various clients, in the double commission deals which they procured for themselves by means of obtaining subcontracts for their clients from contractors who were also their clients, and in the common inability of the contractors they represented to perform the contracts which were purportedly procured through the services of the Tuckers. (These observations are based entirely on the report of the Comptroller General, and are of course not entitled to any more weight than hearsay is normally accorded in a judicial proceeding, for the record

in the instant proceeding contains no evidence of probative value on these collateral matters.) The following relevant passages are quoted from the report in question in order to reflect the advice given by the Comptroller General to the Army as to both factual and legal aspects of his views resulting from the investigation made to that time:

> The Acme Coppersmithing & Machine Company's employment of Harry K. Tucker, Jr., was not previously investigated by our Office. It now appears that there was no misrepresentation concerning such employment and that Harry K. Tucker, Jr., might have qualified as a full-time employee since he worked at the Lansdale Plant of Acme Coppersmithing & Machine Company where he was placed in charge of sales and Government contracts. Thus, it is questionable whether there was any breach of the contingent-fee covenants in the contracts of that company.
>
> In regard to the cancellation of contract No. DA–36–034–ORD–1213(R), the record now shows that James Samuel Norris, Harry K. Tucker, Jr., and Jack Epstein, employees of Acme Coppersmithing & Machine Company, were indicted for conspiracy to solicit fees, compensations, etc., as an inducement for award or an acknowledgment of the award of subcontracts or orders. We have ascertained that Jack Epstein, son of Acme's president, Joshua Epstein, was associated with Tucker and Norris in the operation of the Lansdale Plant and that an agreement was executed between Tucker and Norris on the one hand and Acme on the other providing for a distribution of profits made at Lansdale Plant on the following basis: 50 percent to Acme; 25 percent to Harry K. Tucker, Jr., and 25 percent to James S. Norris. Hence, there appears to have been a closer relationship between the company and these employees than normally would be the situation where apparent violations or attempted violations of the Anti-Kickback statute, 41 U.S.C., 51–54, have been disclosed.
>
> * * * * *
>
> * * * The Department of Justice has apparently taken the position that Acme's civil liability under the Anti-Kickback statute cannot be considered as amounting to more than the sum of $14,600, representing the total of the amounts paid to Gunn Engineering Company or to the employees of Acme by subcontractors under contract No. DA–36–034–ORD–1213(R), which is essentially a cost-reimbursable contract since it provides for-

price redetermination based upon increases or decreases in costs of performance.

* * * * *

There has been no indication that the contractor delivered or intended to deliver supplies which were different in substance from those contracted for. Further, it appears that at the time contract No. DA–36–034–ORD–1213(R) was canceled, the Government was in a position to ascertain the probable extent of the damages likely to be sustained as the result of the fraudulent actions of the employees or "partners" of the Acme Coppersmithing & Machine Company, and to have protected itself against the payment of excessive charges for the supplies delivered or to be delivered under the contract.

Moreover, the Anti-Kickback Act is directed primarily against the payers and recipients of the illegal fees, commissions, etc., and the statute appears to imply that a prime contractor's responsibility in such matters should not generally be determined on the basis of the rule adopted in various criminal cases that a corporation may be held liable for the acts of an agent within the scope of his authority. *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798).

* * * * *

In the circumstances—and since our investigation has disclosed that Acme discharged James S. Norris in the early summer of 1953, and terminated Tucker's and Epstein's employment when it learned of the full scope of the FBI investigation of kickbacks from some of Acme's subcontractors—you are advised that we perceive no objection to treatment of the contract as having been terminated for the convenience of the Government. Otherwise, consistent with the principle that rescission has the effect of annihilating a contract so effectually that in contemplation of law it has never had any existence, we would appear to be required to disallow any outstanding claims of the contractor as for unliquidated damages which cannot be paid out of appropriated funds.

In the event that the contract is terminated for the convenience of the Government, we would be in a position to authorize payment on the outstanding claim of the contractor in the amount of $18,810.75, with the understanding that the amount of the kickbacks involved in the award or acknowledgment of subcontracts or orders under contract No. DA–36–034–ORD–1213(R) will be withheld by your Department in making payment on the termination claim or the amount finally determined

to be due the contractor under the price redetermination article of the contract. Your further report and recommendation concerning the disposition of the above claim for $18,810.75 are requested.

Although we have not completed our investigation of the activities of the Tuckers, our records will be made available for examination by representatives of your Department whenever so desired. The enclosures with your letter dated April 19, 1955, are returned herewith except for one complete set of the photostatic copies of the original papers which will be retained here for use in connection with such investigation.

(i) On April 3, 1956, the Chief of Army Ordnance was furnished a copy of the Comptroller General's opinion of March 16, 1956, and was directed by the Deputy Chief of Staff for Logistics (DCSLOG) to "furnish the Comptroller General * * * with a report and recommendation concerning the disposition of the above mentioned claim in the amount of $18,810.75, on or before 7 May 1956." At this point, the top echelon of the Army may have been in favor of converting the contract cancellation into a termination for convenience of the Government so that the plaintiff could file and have considered its claim for termination costs under Article 22 of the contract.

(j) In the meantime Norris, Tucker and Jack Epstein had been indicted for violation of the criminal provisions of the Anti-Kickback Act (41 U.S.C. 51, 52 and 54). At the conclusion of the prosecution's case, on April 13, 1956, the Federal District Court Judge entertained and granted a defense motion for judgment for acquittal of the defendants on the sole legal ground that the Anti-Kickback Act was not applicable to a price redetermination contract and thus the scheme of the defendants was "despicable and morally reprehensible, but unfortunately within the narrow letter of the law." (See finding 31, *supra*, for more complete quotations.)

(k) The Ordnance Corps continued its review of the facts surrounding the Acme-Tucker relationship. On August 22, 1956, Mr. Lazure responded to the April 3, 1956 communication from DCSLOG (finding 54(i), *supra*), and sought concurrence by the latter in a proposal to refer back to the Comptroller General for reconsideration in the light of additional information the question as to whether plaintiff had

not breached the contingent fee covenant of the contract. The specifics of the "certain facts and additional information" presented by Mr. Lazure leads to the conclusion that it was in actuality not evidence theretofore unknown to the departments concerned, but was rather a reappraisal and argument that these known facts constituted a violation of the covenant against contingent fees. The Army Ordnance Corps through its General Counsel was unswerving in its views that cancellation of the contract was legally justified, despite some discouraging responses from other agencies of the Government which had reviewed the matter.

(l) On September 12, 1956, the Deputy Chief of Staff for Logistics instructed the Chief of Ordnance that, as had been discussed earlier at a conference on July 12, 1956, if it were ascertained what actual damage had been suffered by the Government as a result of increased contract costs due to kickbacks, and if the Department of Justice would give assurance that it could successfully defend the cancellation action, the Chief of Ordnance should prepare a letter to the Comptroller General informing him of the Army's intention to stand by the cancellation action. But if no actual damages to the Government could be shown or the Department of Justice could not give the assurance indicated, then the cancellation action was to be changed into a termination for convenience, as DCSLOG had directed on April 3, 1956. The Chief of Ordnance was given until September 30 to comply.

(m) It is not in evidence whether the Department of Justice gave the Chief of Ordnance the assurances referred to in the preceding paragraph, but on February 27, 1957, DCSLOG sent a letter to the Comptroller General reciting the reasons for his conviction that plaintiff had violated the covenant against contingent fees and presenting "additional information" to this effect, although the "additional information" was much the same as that described in paragraph (k) of this finding, *supra*. The letter concludes with the following paragraph:

> After examination of the reports of the Ordnance Corps on this matter and the various internal reports of the Department of the Army, the Federal Bureau of In-

vestigation and the decision of the court in the matter concerning the three individuals, the Department of the Army believes the action instituted by those three individuals was as responsible and authorized representatives of the Acme Corporation under contracts of the United States; that such actions as corporate representatives were clearly and unequivocally in bad faith; and that there was a full intent to deceive the United States Government. The acts of these three individuals were detrimental to the interest of the United States. In view thereof, it is proposed that the cancellation of subject contract will remain in effect.

It was at this point that the Army solidified its decision to stand by the cancellation action. It felt that "the repudiation of [the contract] by the contracting officer was proper and necessary in the public interest".

(n) On May 29, 1957, the Comptroller General responded to the Army's letter of February 27, 1957, and reversed his previous views in the following words:

> On the basis of the additional information furnished in the matter, we are of the opinion that, as suggested in your letter, the relationship between Harry K. Tucker, Jr., and the Acme Coppersmithing & Machine Company is for consideration as being within the same category as the relationship between Harry K. Tucker, Sr., and Snap-Tite, Inc., so far as there may be concerned the question as to whether there was any breach of the contingent fee covenants of the contracts awarded to those companies. Thus, it is apparent that the Acme Coppersmithing & Machine Company should be held liable for the breach of the contingent fee covenants of contracts Nos. DA–11–070–ORD–8580, 8592 and 8681.
>
> In regard to the cancellation of contract No. DA–36–034–ORD–1213(R), your letter sets forth that, on the basis of a complete administrative review of the matter, including consideration of the decision rendered on April 13, 1956, in the case of *U.S.A. v. James Samuel Norris, Harry King Tucker, Jr., and Jack Harry Epstein*, Criminal No. 18536, and the internal FBI reports, it is proposed that the cancellation of the contract will remain in effect. In view of the unusual nature of this case and of the doubt which exists as to whether, under the circumstances, the contractor is entitled to have the contract terminated for convenience of the Government, we will interpose no objection to your permitting the cancellation action to stand.

The "additional information" providing the stated basis of the Comptroller General's change of mind as to violation of the covenant against contingent fees was his ascertainment that Tucker was a parttime and not a fulltime employee of plaintiff at the time of plaintiff's bid submission on Contract 1213 on January 5, 1953. It is not clear whether the Comptroller General's change of view was brought about more by his reconsideration of facts previously known than by consideration of new evidence offered by the Army in the form principally of the plaintiff's letter of May 18, 1953 to POD (finding 8(f), *supra*).

(o) On July 26, 1957, the plaintiff filed the instant petition in the Court of Claims. On August 15, 1958, plaintiff submitted to POD a termination claim. Subcontractor All Metals had submitted its termination claim on June 18, 1958, and subcontractor Manalapan had prepared certain inventory schedules in November 1954.

55. *Conclusions.* On the basis of the foregoing recital the plaintiff contends that the Army Ordnance Corps was guilty of bad faith in perversely and steadfastly refusing to capitulate to plaintiff's demands for an administrative settlement in the face of unanimous advice from the Comptroller General and the Department of Justice that there had been no violation of the statutes relied on in canceling the contract. The stubborn but permissible refusal of the Ordnance Corps, the contracting agency in the case, to follow the advice and recommendations given it from the indicated sources portrays a strength of conviction, but not bad faith. On its part the defendant complains that, through the period from cancellation to and beyond the filing of suit in July 1957, the plaintiff and its attorneys continuously sought action on the claim and had Members of Congress intercede in its behalf. Such action has no bearing on the issues now before the court.

SUBMISSION OF ALLEGEDLY FALSE CLAIMS DURING PENDENCY OF COURT PROCEEDING

56. *Acme's claim.* Just as the defendant contends that the plaintiff advanced false claims to the Government in the price redetermination proceedings as related in finding 52, *supra*, the defendant also contends that false claims were

advanced by plaintiff in the course of proceedings in this court, in contravention of 31 U.S.C. 231–233, and 28 U.S.C. 2514.

(a) On October 23, 1958, the commissioner directed plaintiff to furnish to the defendant under former Rule 28(b)(2) a detailed statement showing the items included in the sums sought in the petition. On November 4, 1958, plaintiff's counsel informed the commissioner that, "at the request of the Department of Justice, plaintiff has presented the fiscal aspects of its claim in the form of a termination claim pursuant to the Armed Services Procurement Regulations", and that after receipt of the audit report made by the Army Audit Agency the parties would try to settle the claim.

(b) The termination claim referred to in the preceding paragraph had been submitted by plaintiff on a form entitled "Settlement Proposal (Total Cost Basis)" under date of August 15, 1958, under a certification reading in part as follows:

> (1) As to Contractor's Own Charges.—The proposed settlement (*exclusive of charges set forth in Item 14*) and supporting schedules and explanations have been prepared from the books of account and records of the contractor in accordance with recognized commercial accounting practices; they include only those charges allocable to the terminated portion of this contract; they have been prepared with knowledge that they will, or may, be used directly or indirectly as the basis of settlement of a claim or claims against the United States or an agency thereof; and the charges as stated are fair and reasonable.

On April 14, 1959, the Department of Justice sent to plaintiff a copy of the audit of the termination claim made by the Army Audit Agency, with the understanding that "this information is furnished you in connection with pending settlement negotiations only and, in accordance with agreement of counsel, is not to be used to prejudice any defenses which the Government has asserted or may assert in the action in the Court of Claims." In its response to plaintiff's Notice to Admit the defendant stated: "The termination claims filed by the parties mentioned were filed for the purpose of settlement negotiations and were not submitted in accordance with Rule 28(b)." Under the circumstances it

is concluded that the termination claim to which reference has been made was submitted for settlement purposes and not as a compliance with the commissioner's direction under former Rule 28. On August 27, 1959, plaintiff responded to the audit report thus furnished, summarizing the fiscal issues and objecting to certain charges and disallowances.

(c) Whether submitted as a termination claim or in compliance with the former Rule 28 requirement of the commissioner, the defendant contends that the termination claim, dated August 15, 1958, contained false claims. It is correct that the termination claim included all but $5,561.31 of those items enumerated in paragraph (b) of finding 52, *supra*, which lists certain objectionable items contained in plaintiff's price redetermination application. The $5,561.31, which plaintiff had previously asserted as relevant costs in the price redetermination application, were eliminated as such in the termination claim because plaintiff could not provide supporting detail, and they were reclassified as General and Administrative expense, of which a portion was allocated against Contract 1213. The $5,561.31 in expenses reclassified to General and Administrative expense included expenses of entertaining visitors from Watervliet Arsenal, payments made to Watervliet Arsenal employee Harold Lee for services rendered (see finding 33, *supra*), and part of Hochstuhl's hotel bill. In addition, there was included in General and Administrative expense the $12,450 paid by plaintiff to Tucker for salaries and/or commissions, of which a portion was allocated to Contract 1213.

(d) In determining whether the plaintiff practiced fraud in the submission of its termination claim as described in the preceding paragraphs, the consequences of the fact that it may have been submitted as part of a settlement proposal instead of a formal claim are subject to dispute by the parties. At the time the termination proposal was submitted the defendant was fully aware of all of the facts giving origin to those items of the claim which the Government contends were falsely charged to the contract. The presentation of these items by the plaintiff to the Army in the form of a termination claim or settlement proposal did not deceive nor was it intended to deceive the Army, although it was an effort to obtain payment from the Army of ex-

penses which the plaintiff knew or should have known were questionable in part as to being properly chargeable against the contract. The questionable expenses in the termination proposal were not charged directly against the contract, but were charged to the plaintiff's General and Administrative expense, and in this way only a portion of the $18,011.31 of questioned expenses was allocated to the contract performance costs. Some, if not all, of the total questioned expenses would be properly included in the plaintiff's overall General and Administrative expense as costs of doing business, even though they would not be properly chargeable against the contract as a cost of its performance.

(e) On June 16, 1961, the plaintiff filed a "Statement of claims intended to be proved pursuant to Rule 28(b)(2)". It included separate schedules of damages for plaintiff and for its subcontractors, as well as the following statements:

> Pursuant to Rule 28(b)(2) plaintiff submits herewith a schedule of damages claimed by the plaintiff and in addition thereto, a schedule of damages claimed by plaintiff's subcontractors.
>
> In the main the plaintiff's schedule is the same as was set forth in the settlement proposal which it furnished to the Department of Justice pursuant to the request of the Philadelphia Ordnance District except as modified where indicated. The modifications principally were acceptances of the Army Audit Agency's determinations.
>
> After the items in the said settlement proposal were audited, the Army Audit Agency prepared its report. A copy of the said Army Audit Report of the plaintiff's settlement proposal was furnished to the plaintiff. A copy of each of the Army Auditors Report relative to each subcontractor was not furnished to plaintiff. For comparative purposes the plaintiff lists the determinations made by the Army Audit Agency and the amounts on the individual items *which are still in issue.*
>
> * * * * *
>
> SUBCONTRACTORS' CLAIMS
>
> While the subcontractors' claims have not been audited or examined by the plaintiff, it does not know or have reason to believe that there are any elements of overstatement in the said claims. Plaintiff has relied upon the audit of these claims by the Government to determine their accuracy and reasonableness.

> For purpose of the submission under Rule 28(b)(2) all subcontractors' claims for damages are based upon the items included in the various subcontractor settlement proposals which have been submitted by each of them.
>
> * * * * *
>
> If the defendant has any knowledge or reason to believe that any of the items of the claims set forth hereinabove are not accurate as to amount, or not properly includable as an item of damage, plaintiff would welcome the opportunity of one or more pretrial conferences in which to discuss the same. This suggested procedure would narrow the issues and speed up the disposition of the subject litigation.

The plaintiff's schedule in its former Rule 28(b)(2) submission eliminated from its previous claim all of the questioned items contained in the termination settlement proposal described in paragraph (c) of this finding (relating to such items as entertainment expenses, payments to Mr. Lee of Watervliet Arsenal, certain travel expenses of Tucker, Jr., and certain expenses in connection with Norris' farm), but retained a proportionate part of the $12,450 paid to Tucker as salaries and/or commissions, and the claims of the subcontractors (under the conditions quoted above) containing in part the fees paid by the subcontractors to Tucker as related in findings 22 through 25, *supra*. The presentation of these items by plaintiff did not deceive nor was it intended to deceive the Army, which was fully aware of all of the facts giving origin to the items now claimed to have been falsely charged.

(f) By way of counterclaim under 31 U.S.C. 231–233 the defendant seeks an affirmative judgment for $2,000 for plaintiff's misrepresentations in the price redetermination proceedings (finding 52, *supra*), plus $2,000 for misrepresentations in the termination settlement proposal (finding 56(a) through (d), *supra*), plus $2,000 for misrepresentations in connection with plaintiff's schedule submitted pursuant to former Rule 28(b)(2) as related in paragraph (e) of this finding. These counterclaims under 31 U.S.C. 231–233 are in addition to the forfeiture asked for in defendant's special plea in fraud based on violations of 28 U.S.C. 2514, but the facts constituting the alleged violations are the same in each instance.

57. *Subcontractors' claims.* Defendant has requested that findings be made that All Metals and Manalapan practiced fraud against the Government in the presentation of their instant claims by including in their statements of costs items not contributing to subcontract performance (i.e., fees to Tucker and/or Gunn Engineering Company) and thus inflating plaintiff's claimed costs. The facts upon which the finding of fraud or lack of it must rest are contained elsewhere in these findings. See findings 18–22 *supra.*

ASSIGNMENT OF CLAIMS

58. *By Acme.*

(a) Plaintiff was closely affiliated with the National Molasses Company, shared offices in the same building, and had interlocking corporate officers and stockholders. Plaintiff had borrowed $275,000 from National Molasses Company in 1955 on a non-interest bearing basis. On February 2, 1956, the plaintiff's Board of Directors authorized the execution of a mortgage on plaintiff's real property to secure $150,000 of the debt to National Molasses Company. On February 7, 1958, plaintiff's Board of Directors authorized the execution of a second mortgage on plaintiff's real property and a mortgage on its principal items of machinery and equipment to secure a further $125,000 of the debt to National Molasses Company.

(b) On February 29, 1960, at a time when the plaintiff's offer to settle its claims arising out of Contract 1213 was under consideration by the defendant, the plaintiff and All Metals entered into a letter agreement whereby any payment received by plaintiff from defendant in settlement of the contract claims was to be endorsed over to the Pittsburgh National Bank for distribution to plaintiff and All Metals in proportions stipulated in the agreement. The letter agreement was conditioned on settlement of the Contract 1213 claims with the Government by April 15, 1960. The Pittsburgh National Bank, which was the assignee under an earlier assignment from All Metals for the purpose of financing All Metals' subcontract under Contract 1213, endorsed its agreement to the letter agreement of February 29, 1960.

(c) On August 8, 1960, the plaintiff executed the following "assignment" and sent it to the Pittsburgh National Bank:

> Acme Process Equipment Company (formerly Acme Coppersmithing and Machine Co.), being entitled to certain proceeds and payments from the United States Government by reason of its contract No. 1213–R, and whereas the said Acme Process Equipment Company has heretofore, by letter agreement dated March 4, 1960, authorized the Pittsburgh National Bank (formerly Peoples First National Bank and Trust Company), assignee of All Metals Industries, Inc., to receive and disburse the moneys as therein provided, and it now being the intention of Acme Process Equipment Company to secure National Molasses Company, a corporation with principal place of business at Oreland Mill Road, Oreland, Pa., to which it is indebted, now therefore, subject to the letter agreement aforesaid referred to, Acme Process Equipment does hereby assign, set over and transfer to it, the said National Molasses Company, whatever proceeds it, the said Acme Process Equipment Company shall be entitled to as aforesaid, up to but not in excess of the sum of $275,000, and this assignment and transfer of the proceeds as aforesaid up to $275,000, shall stand binding and unrevoked unless and until the Pittsburgh National Bank shall receive appropriate written authority to the contrary from both Acme Process Equipment Company and National Molasses Company.

The letter agreement of March 4, 1960, to which the foregoing assignment of August 8, 1960 refers, is the letter agreement dated February 29, 1960, described in the preceding paragraph (b). From the circumstances under which it was made, including the references in the document itself, the terms of the resolution of plaintiff's Board of Directors which authorized the execution of the assignment, and the fact that plaintiff had already executed another assignment of contract proceeds to the Girard Trust Corn Exchange Bank for the purpose of financing Contract 1213, it is reasonable to conclude that the assignment to National Molasses Company was not an assignment of its claim against the Government (as defendant contends), but (as plaintiff contends) merely a direction to a neutral bank to distribute a share of the proceeds of an anticipated settlement to the

National Molasses Company when and if the settlement materialized, which was at the time by no means certain and as a matter of fact did not materialize.[12] Thus the assignment was dependent on a contingency which did not occur. A test would be whether, in the event a judgment were ultimately awarded to plaintiff in the instant litigation, the so-called assignment to the National Molasses Company would be enforceable. The National Molasses Company has asserted no interest in the instant litigation.

(d) On November 9, 1960, the plaintiff and All Metals entered into a revised letter agreement in the form of a joint direction to Pittsburgh National Bank, which rescinded the earlier letter agreement dated February 29, 1960 and substituted other directions as to the distribution of any settlement proceeds received from the Government as a result of a revised settlement offer in a smaller amount made by plaintiff to the Government. This offer was not accepted by the Government.

59. *By All Metals.* On March 11, 1953, All Metals assigned the proceeds of its subcontract with plaintiff to the Peoples First National Bank & Trust Company and notified plaintiff. This banking institution changed its name to the Pittsburgh National Bank in the course of a merger, and is now the owner of the assignment. The plaintiff waived its right to make payment to other than the assignee and its right of setoff for any claims which it might have except for claims arising under the subcontract. On April 3, 1954, the plaintiff advised All Metals in part as follows:

> 9. You further agree that as against Peoples First National Bank & Trust Company, of Pittsburgh, Pa., to whom we have assigned our accounts receivable, including all sums due or to become due under the above mentioned purchase order, as collateral security for loans made or to be made to us by the said bank, and as an inducement to the said Peoples First National Bank & Trust Company to make a further loan or loans to us, you will not assert any defenses, set-offs, counterclaims or recoupments, of any nature or kind, arising from your dealings with us, excepting only such set-off as shall represent the rental of equipment to us for the performance of the above mentioned purchase order, which shall only

[12] The defendant has taken no exception to this finding.

be asserted against the amounts payable for the last deliveries under the said purchase order, and which shall not exceed $8,421.26.

The defendant has not formally pleaded as a defense that All Metals assigned its claim in violation of law and considers the issue to be irrelevant. However, the pertinent facts have been included at the plaintiff's request.

DAMAGES

60. *Acme's costs and credits.* The following schedule lists the items and amounts which Acme claims it incurred in contract performance, the amounts thereof verified by defendant as properly chargeable to contract performance, the amounts in issue, the credits against the costs, and post-cancellation expenses.

Item	Claimed by plaintiff	Verified and/or claimed by defendant	In issue
Costs			
Direct material	$440,796	$440,796	None
Direct labor:			
Overtime	11,186	None	$11,186
Straight	206,834	206,834	None
Indirect factory expense on:			
Overtime labor @ 119.89%	13,411	None	13,411
Straight labor	224,110	224,110	None
Dies, jigs, fixtures, special tools	82,264	37,359	44,905
Other costs	62,359	52,632	9,727
Total costs before G & A	1,040,960	961,731	79,229
G & A (6.25%)	95,984	51,302	44,682
Total costs	1,136,944	1,013,033	123,911
Credits			
Partial payments to plaintiff	389,310	389,310	None
Disposal credits	621	621	None
Undelivered tools	None	6,206	6,206
Scrap	None	1,118	1,118
Duplicate payment	None	674	674
Defective rifles	None	5,668	5,668
Unreturned vent assemblies	None	4,760	4,760
Liquidated damages	None	56,316	56,316
Total credits	389,931	520,989	131,058
Total costs less total credits (loss)	747,013	592,044	----------
Post-Cancellation Costs			
Rental of Lansdale plant	29,144	None	29,144
Insurance	750	None	750
Interest on V-loan	16,506	None	16,506
Legal fees	15,152	None	15,152
Maintenance	5,400	None	5,400
Total post-cancellation costs	66,952	None	----------

Acme admits the defendant's entitlement to the following amounts by way of counterclaim: $6,206 for undelivered tools (finding 53), $674 for a duplicate payment; $2,519 for defective rifles; $4,760 for unreturned vent assemblies; and $1,739 as a disposal and scrap credit (see, in part, finding 53(e)). The total amount of this counterclaim is $15,898.

61. *All Metals' costs and credits.* The following schedule lists the items and amounts which All Metals claims it incurred in subcontract performance, the amounts thereof verified as applicable by defendant as properly chargeable to subcontract performance, the amounts in issue, the credits against the costs, post-cancellation expenses, unreimbursed costs of third-tier subcontractors, and total amounts due All Metals.

Item	Claimed by All Metals	Verified and/or claimed by defendant	In issue
Costs			
Direct material	$89,920	$79,830	$10,090
Direct labor	111,774	107,879	3,895
Indirect factory expense	58,264	49,236	9,028
Dies, jigs, fixtures, tools	80,063	43,710	36,353
Total costs before G & A	340,021	280,655	
G & A (31.37%)	38,115	33,287	4,828
Total costs	378,136	313,942	64,194
Credits			
Payments by Acme	201,827	201,827	None
Disposal credits	430	430	None
Total credits	202,257	202,257	None
Net due under subcontract			
Costs less credits			
Profit or loss on completion			
Net due under subcontract			
Post-cancellation costs			
Accounting fees	3,070	None	3,070
Management salaries	6,000	None	6,000
Telephone	1,000	None	1,000
Travel	2,000	None	2,000
Office rent	345	None	345
Storage	702	None	702
Insurance	755	None	755
Plant labor	2,000	None	2,000
Interest	60,488	None	60,488
Total post-cancellation costs	76,360	None	76,360
Third-tier subcontracts			
Canton	10,434	10,434	None
Edgewater	3,713	3,713	None
Total due All Metals	14,147	14,147	None

62. *Claims of other subcontractors: Fiscal aspects.* Subsequent to the cancellation of Contract 1213 certain of Acme's subcontractors filed claims against Acme to recover sums relating to their subcontracts which Acme had, in turn, canceled. Other than All Metals, whose claim has already been described, these other subcontractors, the claims they present here, and the extent of verification of their claims, are shown in the following schedule:

Subcontractor	Amount claimed	Verified by defendant	In issue
Steel Heddle	$1,514	$1,514	None
Intricate	2,006	2,006	None
Pattern	2,616	2,616	None
Foley	3,726	3,476	250
Nicholson	1,886	296	1,590
Manalapan	36,999	21,629	15,370
Totals	49,047	31,537	17,210

Although defendant verified these claims to the extent indicated, plaintiff did not prove at the trial the claims of Steel Heddle, Intricate, Pattern, and Nicholson.

63. *Manalapan's claim.* The deletion of $15,370 from the claim by Manalapan consists of $4,120 for various items which Manalapan waived, and a storage claim of $11,250. Manalapan claims to have stored a quantity of tooling owned by the Government after contract cancellation and to have maintained it in storage. The evidence fails to establish that the Government owned the tooling which Manalapan claims to have stored. During the post-cancellation period the Government made diligent efforts to get plaintiff to return Government-owned tooling thought to be in the possession of Manalapan, but Manalapan at that time denied that it had possession of the tooling. It cannot now claim storage charges for the storage of Government-owned tooling of which it previously denied possession.

64. *Right to relief.* The defendant contends that, under the terms of their subcontracts with Acme, none of the subcontractors had recourse against Acme and, accordingly, no actions can be maintained in their behalf against the Government. The specific language of the subcontracts upon which the defendant bases this contention is shown below.

(a) *Nicholson, Steel Heddle, Intricate, Pattern, and Foley subcontracts.* In each of the subcontracts mentioned, and in all of the several purchase orders issued to Manalapan, the following language appears:

3. We reserve the right to cancel entirely or to reduce the quantity of material covered by this order.

(b) *Manalapan.* In two of the purchase orders issued to Manalapan by Acme the following conditions appear in addition to that quoted above:

3. INVOICES. * * * Each invoice (including copies) must be certified as follows: "I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with. This order and the work done or articles furnished hereunder shall be subject in all respects to the prime contract and to any statute, law, rule, regulation or administrative action relating to the foregoing." The liability of the buyer for payment of any articles delivered by the seller shall be contingent upon the buyer being reimbursed thereof by the government under the prime contract. * * *

* * * * * *

12. CANCELLATION: (a) Buyer reserves the right to cancel this order or any part thereof (without any liability to Seller except for the purchase price of articles previously delivered to and accepted by Buyer and the Government) if delivery is not made within the time specified or within a reasonable time in case no time is specified, or if the quantity or quality of the articles ordered is not as specified herein, except in those cases in which such delay or default is due to causes beyond Seller's control and without Seller's fault or negligence, including, but not restricted to acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes. (b) Buyer also reserves the right at any time whenever the prime contract is cancelled to cancel this order, or any part thereof, by written notice to Seller, even though Seller is not in default hereunder, and this order is subject to all the terms and conditions of the usual standard form of provisions of clauses providing for the termination of supply con-

tracts for the convenience of the Government, and to all the terms and conditions of any prime contract to which this order relates. Thereupon Seller shall, unless the notice otherwise specifies, discontinue all work and the placing of orders hereunder and shall cancel all existing orders and subcontracts. Upon such cancellation settlement of any amounts due the Seller shall be in accordance with such equitable settlement of any approved and allowed by the Government as being reimbursable to the Buyer under the prime contract. Buyer shall be under no liability for the payment of such settlement until it receives from the Government approval and allowance of Seller's claim in respect of such settlement. Either before or after cancellation all rights of the Buyer herein may be assigned to the Government and thereupon all liability of the Buyer and Seller shall terminate except as to articles previously delivered to and received and accepted by the Buyer and the Government, and then only to the extent the Buyer has been reimbursed by the Government for the purchase price thereof.

It is not known to what extent the two purchase orders in question are represented in Manalapan's claim.

(c) *All Metals.* The provisions quoted above in paragraph (b) in the two Manalapan purchase orders were also contained in the purchase order issued to All Metals, except that, by amendment requested by All Metals, the following proviso was added at the end of Conditions 3 and 12, entitled "Invoices" and "Cancellation", respectively:

* * * provided, however, that in any event, where the buyer is not reimbursed by the government by reason of any matter, cause or thing not within the seller's control, the buyer shall remain liable to the seller for the articles delivered.

(Note: The same provisions were contained in the purchase order issued by Acme to All Metals under Contract 8580, and are reprinted in finding 19 in *Acme Process Equipment Co.* v. *United States*, Ct. Cl., No. 538–59, decided this day on pages 11–13 of the opinion accompanying that report the legal effect of the provisions on the right of Acme to prosecute a claim on behalf of All Metals is discussed.)

(d) All Metals assigned the proceeds of its subcontract to a bank to secure a loan of money for the performance of the subcontract. Acme accepted the Notice of Assignment from the bank and waived "its right of set-off for any claims which

it might have or might hereafter have except for claims arising under the contract and/or Purchase Order referred to herein." Following the termination for convenience of the Government of plaintiff's Contract 8580, All Metals' bank was unwilling to continue to finance All Metals for the performance of the contract in suit unless it received certain assurances from Acme. These assurances were forthcoming in the form of an agreement between Acme and All Metals, contained in a letter of April 3, 1954, from All Metals to Acme, which read in part as follows:

> 9. You further agree that as against Peoples First National Bank & Trust Company, of Pittsburgh, Pa., to whom we have assigned our accounts receivable, including all sums due or to become due under the above mentioned purchase order, as collateral security for loans made or to be made to us by the said bank, and as an inducement to the said Peoples First National Bank & Trust Company to make a further loan or loans to us, you will not assert any defenses, set-offs, counterclaims or recoupments, of any nature or kind, arising from your dealings with us, excepting only such set-off as shall represent the rental of equipment to us for the performance of the above mentioned purchase order, which shall only be asserted against the amounts payable for the last deliveries under the said purchase order, and which shall not exceed $8,421.26.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover in accordance with the foregoing opinion. The court also concludes that the defendant is entitled to recover seventeen thousand eight hundred ninety-eight dollars ($17,898), on its counterclaims. The amount of plaintiff's ultimate recovery will be determined, purusant to the opinion, under Rule 47(c).

U.S. GOVERNMENT PRINTING OFFICE: 1966

BLANK

PAGE

BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.
No. 1110

Office-Supreme Court, U.S.
FILED
APR 8 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JACK REPHAN
1120 Connecticut Avenue, N. W.
Washington, D. C.

RAYMOND R. DICKEY
1120 Connecticut Avenue, N. W.
Washington, D. C.

BERNARD GORDON
1120 Connecticut Avenue, N. W.
Washington, D. C.

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

BLANK

PAGE

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	4
1. The contract	4
2. Proceedings below	8
Argument I	11
Argument II	16
Conclusion	19

CITATIONS

CASES:

Acme Process Equipment Company v. *United States*, 347 F. 2d 509 (Ct. Cl. 1965) 1
Carrier Corp. v. *United States*, 328 F. 2d 328 (Ct. Cl., 1964) 16
Chain Belt Co. v. *United States*, 115 F. Supp. 701 (Ct. Cl., 1953) 11
Goldwasser v. *United States*, 325 F. 2d 722 (Ct. Cl. 1963) 13
Klein v. *United States*, 285 F. 2d 778, 783 (Ct. Cl., 1961) 13
Maryland Casualty Co. v. *Tulsa Industrial Loan & Investment Co.*, 83 F. 2d 14 (C.A. 10, 1936) 16
Michael Del Balso, Inc. v. *Carozza*, 136 F. 2d 280 (C.A.D.C., 1943) 14
Muschany v. *United States*, 324 U.S. 49, 66-67 (1945) 8
Pelletier v. *Masse*, 49 R.I. 408, 143 Atl. 609 (1928) .. 14
Perry v. *United States*, 294 U.S. 330, 352 (1935) 12
Southern Painting Co. v. *United States ex rel. Silver*, 222 F. 2d 431, 433-34 (C.A. 10, 1955) 14
United States v. *Barnard*, 255 F. 2d 583 (C.A. 10, 1958) *certiorari denied*, 358 U.S. 919 (1958) 7, 9, 18

Page

United States v. *Behan*, 110 U.S. 338 (1884) 13
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) 9, 16, 18
United States v. *Penn Foundry & Mfg. Co.*, 337 U.S. 198 (1949) 11
United States v. *Shapiro, Inc.*, 202 F. 2d 459 (C.A.D.C., 1953) 12
United States ex rel. Susi Contracting Co. v. *Zara Contracting Co.*, 146 F. 2d 606 (C.A. 2, 1944) 14
Valente v. *Weinberg*, 80 Conn. 134, 67 Atl. 369 (1907) .. 14
Virginia Railway Co. v. *Mullens*, 271 U.S. 220 (1926) .. 12

STATUTES:

Anti-Kickback Act, 60 Stat. 37, 74 Stat. 740, 41 U.S.C. 51 .....2, 6, 8, 9, 11, 16, 17, 18, 19

Tucker Act, 62 Stat. 940, as amended, 28 U.S.C. 1491 ..2, 10

MISCELLANEOUS:

5 Corbin, *Contracts*, §§ 1102-21 (1951) 13
3 Fletcher, *Private Corporations*, § 826 (rev. ed. 1947) 16
H. Rep. 1880, S. Rep. 1585, 86th Cong. 2d Sess. 7, 18
Restatement, *Contracts*, §§ 347-57 13
5 Williston, *Contracts*, §§ 1454-85 (rev. ed. 1937) ..13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1116

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINIONS BELOW

The opinion of the Court of Claims [App., pp. 1-42] is reported at 347 F. 2d 509. The findings of the Court of Claims [App., pp. 42-144] are unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on June 11, 1965. A timely motion for reconsideration was denied on October 15, 1965. By orders of the Chief Justice and Mr. Justice Brennan, entered

on January 12, 1966, and February 9, 1966, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, under the facts of this case and applicable legal precedent, the contractor is entitled to restitution for the reasonable expenses it incurred in performing the contract which was breached by the government.

2. Whether the discovery of violations of the Anti-Kickback Act between subcontractors and employees of a prime government contractor is, under the facts of this case and under applicable law, a valid ground for a forfeiture of the prime contract.

STATUTES INVOLVED

The Tucker Act, 62 Stat. 940, as amended, 28 U.S.C. 1491, provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Anti-Kickback Act, 60 Stat. 37, as amended, 41 U.S.C. 51, provides in relevant part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, * * * (1) to any

officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; * * * is prohibited. The amount of any such fee, commission, or compensation or the cost of expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor * * *. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor * * * in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime cotnractor or another higher tier subcontractor.

STATEMENT

1. *The Contract.* Until 1952, the business of respondent Acme Process Equipment Company consisted principally of the manufacture of equipment for the distillery, brewery, and sugar industries. In 1952, it became interested in obtaining government contracts in order to offset unevenness in its commercial business, but at such time respondent had no one on its payroll with background and experience in the field of government procurement [F. 2; App., pp. 42, 43].

In October 1952, respondent hired Harry K. Tucker, Jr. and James Norris to manage a separate division to be set up by Acme to handle government contracts in the metals field. Norris was made general manager of production with authority to submit bids, sign government contracts, and award subcontracts; Tucker was put in charge of sales, government contracts, and expediting and coordinating subcontracts [F. 3, 16; App. pp. 43, 55].

On October 23, 1952, Acme submitted a bid to the Army Ordnance Corps for a contract for the manufacture of .75-mm recoilless rifles. Acme's bid price was $337.31 per rifle (later corrected to $337.23). The four other bids submitted by competitive bidders were at unit prices of $484.05, $930.16, $423.00 and $684.00, respectively [F. 45; App., p. 45]. Acme was therefore the low bidder and on January 27, 1953, it was awarded a contract for 2,322 .75-mm recoilless rifles at a unit price of $337.23 per rifle, subject to an upward price revision with a ceiling price of $369.20 per rifle [F. 7, 13, 51, 52; App., pp. 45, 50, 115, 116].

Prior to the award of the prime contract and unbeknown to Acme, Tucker had entered into a contract

with All Metals Industries, Inc., under which he was to receive a commission on sales procured by him for that company. Upon the award of the prime contract to Acme, Tucker secured for All Metals a subcontract from Acme to manufacture chambers and vent assemblies for the .75-mm recoilless rifles [F. 18, 19; App., pp. 56-58].

Subsequent to the award of All Metals' subcontract, Tucker and Jack Epstein (then superintendent of Acme's plant in Oreland, Pennsylvania, and son of its president Joshua Epstein) threatened to cancel All Metals' subcontract unless the subcontractor paid $25,000 to Jack Epstein. As an alternative, an arrangement was made whereby All Metals agreed to pay $23,500 to a dummy corporation owned by Tucker, Norris, and Jack Epstein for consulting engineering services. To cover the amount extorted from All Metals, the subcontractor increased its unit price to Acme for vent assemblies by $10.00. A total of $12,000 was paid by All Metals to Gunn Engineering Company, the dummy corporation referred to above, for services which were never rendered [F. 20; App., p. 58]. Acme had no information until the late summer and fall of 1953 which would lead it to suspect that Tucker, Norris, and Jack Epstein had made illegal arrangements or that it was being victimized by them, and it was not until around the time of the cancellation of Acme's contract in August 1954 that it obtained specific knowledge of the illegal arrangements [F. 20, 30; App., pp. 58, 59, 65].

In addition to the secret arrangements which Tucker had with All Metals, similar arrangements were made

by Tucker with two other companies, both of which were subsequently awarded subcontracts by Acme. None of the officials of Acme (with the exception of Tucker, Norris, and Jack Epstein) were aware of these arrangements until after the cancellation of Acme's prime contract [F. 22, 23; App., pp. 61-63]. A fourth company was awarded subcontracts by Acme after having hired Tucker's father partially on a commission basis, and another company received a subcontract from Acme after having entered into a clandestine agreement to pay commissions to Philip Chagnon on business obtained by him. Chagnon had been previously hired by Norris as his assistant in Acme's plant. None of Acme's responsible officials were aware of the secret arrangement involving Tucker's father or Chagnon [F. 24, 25; App., pp. 63, 64].

Norris was discharged by Acme in September, 1958, after it was discovered that he had charged expenses incurred in connection with work on his farm against Acme's prime contract [F. 26; App., p. 64]. By the end of November, 1958, the employment of both Tucker and Chagnon had been terminated [F. 27, 28; App., p. 65]. On August 28, 1954, Jack Epstein resigned from Acme [F. 29; App., p. 65].

Tucker, Norris, and Jack Epstein were subsequently indicted for violation of the Anti-Kickback Act, 60 Stat. 37 [F. 31; App., p. 65]. After presentation of the government's case, the defendants' motion for acquittal was granted on the ground that the Act at that time did not apply to a fixed price contract with a provision for price redetermination subject to a ceiling

price [F. 54(j); App., p. 128].[1] The District Court remarked that

> "It may well be that Congress thought that in this type of contract the employer would be the one that would protect the interests of the United States, but no employer can protect himself against treacherous employees who are determined to commit morally reprehensible acts and who for the sake of a few paltry dollars, set up the type of vicious scheme that has been set up in this case, which resulted in increased cost both to the employer and to the United States."

The District Court further said that "This case clearly showed that the employer was victimized, and I would say indirectly the United States was also, but the defendants were narrowly within the law." [F. 31; App., p. 66]. As a result of the District Court's decision, amendatory legislation was recommended (H. Rep. 1880, S. Rep. 1585, 86th Cong. 2d Sess.) and the Act was amended in 1960 to apply to all negotiated contracts (74 Stat. 740; 41 U.S.C. 51).

On August 18, 1954, after Acme had delivered 1163 rifles, the Army Ordnance Corps notified respondent that its contact was cancelled for unspecified "statutory violations" [F. 47; App., p. 111]. The circumstances surrounding the cancellation of Acme's contract are set forth in the findings of fact of the Court of Claims [F. 47-50, 54-55; App., pp. 111-115, 121-131].

---

[1] The District Court's decision is not contrary to the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Barnard*, 255 F. 2d 583 (C.A. 10, 1958), *certiorari* denied, 358 U.S. 919 (1958), for the reason that in *Barnard* the contract had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward."

2. *Proceedings Below.* On July 26, 1957, after nearly three years of fruitless but almost successful efforts by Acme to obtain an administrative settlement, stopped only by the intransigence of the Army Ordnance Corps in opposition to advice from other agencies, Acme filed this action in which it sought restitution of its unreimbursed costs of performance or, as an alternative, damages for breach of contract [F. 54, 55; App., pp. 1, 2, 121-131]. The government's major defense to the action was that Acme was entitled to no recovery because it violated certain statutes and covenants (concerning contingent fees, kickbacks, false claims, and conflicts of interest). The Court of Claims, in a 42-page opinion rendered June 11, 1965, unanimously rejected all of the government's defenses and found that the cancellation of Acme's prime contract was unjustified and the government had breached the contract when it was cancelled [App., pp. 1-42].

Insofar as the government's contention that it was entitled to cancel the contract for violations of the Anti-Kickback Act was concerned, the Court of Claims first expressed the opinion that "it is highly doubtful that there was any preexisting right of the Government to cancel the entire contract of a prime contractor, whose agents received improper kickbacks of which he was unaware." The court then went on to state that since Congress in enacting the 1946 Act gave the government only one civil remedy—recovery of the kickbacks—the government had no right to annul the contract [App., pp. 12, 13].

The court below also expressed grave doubts as to whether the 1946 Act was applicable to the contract in question. Citing *Muschany* v. *United States,* 324 U.S. 49, 66-67 (1945), the court said that if the 1946 Act

was inapplicable the improper actions could hardly have contravened any recognized federal public policy. Of particular importance, the court said that

> "When Acme's agents received kickbacks about which plaintiff had no knowledge, it can scarcely be said that *plaintiff* (as distinguished from the agents) violated 'obvious ethical or moral standards,' and that its contract with the defendant could therefore be cancelled on that ground." [App., p. 14]

The decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Barnard,* 225 F. 2d 583 (C.A. 10, 1958), *certiorari* denied, 358 U.S. 919 (1958), was said by the court to be distinguishable because the contract in *Barnard* had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward," as opposed to Acme's contract which contained a ceiling price [App., pp. 14, 15].

The government's contention that the case was governed by the *Dixon-Yates* case (*United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520 (1961)) was rejected by the Court of Claims. The court first pointed out that the statutory provision violated in *Dixon-Yates* was clearly on the books at the time of the misconduct while the court found it "highly questionable" whether the 1946 Anti-Kickback Act applied to Acme's contract. The Court of Claims then went on to say that the cases were different because the statute in *Dixon-Yates* provided for no more than a criminal sanction, whereas Congress in the Anti-Kickback Act specifically provided for a civil remedy. Most significantly, the Court of Claims said that the violation in *Dixon-Yates* affected the validity of the entire transaction since it related to the negotiation and

award of the contract to a not-altogether-innocent contractor. On the other hand, in the instant case, the kickbacks were not related to the negotiation and execution of Acme's contract with the government but were separate transactions involving the subcontractors and were made after the award of the contract to Acme by the government without Acme's knowledge, actual or implied [App., p. 15]. The court below also noted that the wrongdoings of Tucker and his co-conspirators could not be imputed to Acme since Acme "was being swindled by its own agents" [App., p. 11, fn. 12].

With reference to the appropriate measure of damages to be awarded Acme for the government's breach of contract, the Court of Claims held that Acme was entitled to restitutionary relief for the government's breach of its express contract. In so holding, the court acknowledged the fact that restitution has long been recognized as merely an alternative remedy for a breach of contract by the commentators and by both the federal and state courts. Since contracts with the government have been held to be governed by the same principles as "those between man and man," the court below said that it was, consequently, obliged to award restitution to Acme unless this form of recovery was precluded by the Tucker Act, 28 U.S.C. 1491. Acme's claim for restitution was held by the court below to be within the ambit of the Tucker Act because such claim was founded upon an express contract within the meaning of that Act [App., pp. 25-27].

Having established Acme's entitlement to restitution, the court went on to hold that recovery was not limited to the value of the goods actually received by the government but could be based on the reasonable value of Acme's entire performance. The reasonable

value of Acme's performance, said the Court of Claims, is most accurately reflected by the actual costs it incurred in performing its contract unless the government can establish that such costs were excessive [App., pp. 28-30].

The court also held that Acme's recovery must be reduced by any kickbacks it latently paid through payments to its subcontractors so that the government will receive the full statutory relief available to it under the Anti-Kickback Act [App., p. 30].

ARGUMENT I

The Measure of Damages Adopted by the Court of Claims Is in Accordance With Well Established Principles of Contract Law and Is Appropriate Under the Facts of This Case

The position originally advanced by the government and adopted by the trial commissioner in the Court of Claims in this case was that Acme was entitled only to the traditional remedy of damages for breach of an express contract. Relying on *United States* v. *Penn Foundry Mfg. Co.,* 337 U.S. 198 (1949) and *Chain Belt Co.* v. *United States,* 115 F. Supp. 701 (Ct. Cl., 1953), the government argued in the court below that restitution was not available in the absence of proof that all of Acme's costs were attributable to the cancellation of its contract. This argument was rejected by the Court of Claims. In so doing, the court pointed out that the *Penn Foundry* and *Chain Belt* cases dealt only with the disallowance of lost profits as damages when they are too speculative, and since restitution is designed to restore the *status quo ante,* potential profits under the rescinded contract are irrelevant [App., p. 29, fn. 29]. The Court of Claims said further that it was immaterial that under a convenience-termination

(termination for the convenience of the government) Acme's recovery would be limited by its costs and the ceiling price because the instant case involves a breach of contract situation, not a convenience-termination [App., p. 29, fn. 29].

In its petition to this Court, the government, *for the first time,* advances the theory that restitution "runs counter to valid procurement policies adopted by Congress." This theory upon which the government now relies is an entirely new theory. Such a theory was not relied upon by the government in the Court of Claims but is relied upon *for the first time* in the government's petition to this Court. A losing party cannot change its theory on appeal to gain reversal. *Virginia Railway Co.* v. *Mullens,* 271 U.S. 220 (1926); *United States* v. *Shapiro, Inc.,* 202 F. 2d 459 (C.A.D.C., 1953). In any event, the fixed-price policies of the government have no bearing upon the question of damages when the government breaches a contract. When the government, with constitutional authority, makes contracts, "it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry* v. *United States,* 294 U.S. 330, 352 (1935). Although the government recognizes that the Restatement of Contracts, on which the Court of Claims relied, "offers some support for the rule adopted by the court" the government claims that the Restatement does not contemplate government contracts containing the standard termination for the convenience of the government clause. It thus urges this Court to adopt a rule for measuring damages where the government is a party to the contract different from that in the case of private individuals [Pet., p. 16, fn. 14. See Pet., p. 14, fn. 12]. But the fact that

the government may have a right to terminate a contract for convenience does not entitle the government to "breach its contract at will, and then escape the penalty for its breach by retroactively invoking a termination for convenience." *Klein* v. *United States,* 285 F. 2d 778, 783, (Ct. Cl., 1961). The convenience termination clause does not limit the government's liability to pay damages for breach of contract where, as in this case, the cancellation is for the contractor's fault and it is thereafter determined the contractor was not at fault. *Klein* v. *United States, supra.* See also *Goldwasser* v. *United States,* 325 F. 2d 722 (Ct. Cl., 1963).

Restitution in the instant case is supported by the opinion of this Court in *United States* v. *Behan,* 110 U.S. 338, 345-356 (1884)[2] to the effect that "The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred."

The Court of Claims' decision is in accord with the leading authorities in the field of contracts who have said that restitution is merely an alternative remedy for breach of contract. Restatement, *Contracts,* §§ 347-57; 5 Corbin, *Contracts,* §§ 1102-21 (1951); 5

---

[2] It should be noted that in *United States* v. *Behan, supra,* this Court allowed a government contractor recovery of his "actual outlay and expense" as damages for breach of contract. The Court recognized that "If the outlay equals or exceeds the amount to be received" under the contract, there can be no recovery for loss of profit, but nevertheless recovery can still be had for all expenses except those shown to be "extravagant and unnecessary for the purpose of carrying out the contract."

Williston, *Contracts*, §§ 1454-85 (rev. ed. 1937). The court also observed that:

> "The applicability of restitution as an alternative remedy is also well-established in both the federal and the state courts. *E.g., Michael Del Balso, Inc.* v. *Carozza*, 136 F. 2d 280 (C.A.D.C. 1943); *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F. 2d 606, 610 (C.A. 2, 1944); *Southern Painting Co.* v. *United States ex rel. Silver*, 222 F. 2d 431, 433-34 (C.A. 10, 1955); *Valente* v. *Weinberg*, 80 Conn. 134, 67 Atl. 369 (1907); *Pelletier* v. *Masse*, 49 R.I. 408, 143 Atl. 609 (1928)." [App., p. 26]

The government contends that it is unfair and inequitable to award restitution to Acme in this case. However, the government wishes the Court to judge the fairness of awarding restitution only from its own point of view. From a reading of the government's argument, it appears that its argument is a shallow one, to say the least, for its claim of unfairness is premised upon the sole fact that restitutionary relief may result in the government paying more to Acme in this particular case than it would have had to pay if it had not breached the contract because this contract did not prove to be a profitable one for Acme.[3] However, there is no rule of law which limits restitution to cases where a profitable contract has been breached.

---

[3] The Court of Claims found that at least one-third of Acme's production delays in terms of time and cost were caused by the government [F. 43(c); App., p. 104]. It is conceivable, therefore, that, if the government had not terminated Acme's contract, it would have had to pay an amount to Acme substantially in excess of the original contract price to compensate Acme for the increased cost of performance attributable to the actions of the government. It is not therefore necessarily true that restitutional relief in this case will result in the government paying more to Acme than it would have had to pay if it had not breached the contract.

the judiciary to create civil remedies which did not exist under common law.[4]

The Court of Claims properly ruled that although the duplicity of Acme's employees may have given Acme a right to cancel its subcontracts, there was no common law principle under which the government could cancel the prime contract under such circumstances. *Dixon-Yates* did not involve the situation where a prime contractor's employees were also agents of a subcontractor. Instead, that case involved the situation where a government employee was also an agent of a potential subcontractor. The factual and legal situations in the two cases are quite different. Therefore, the decision of the Court of Claims was proper and correct under the facts of the instant case and in no way is in conflict with this Court's decision in the *Dixon-Yates* case.

The Court of Claims expressed great doubt as to the applicability of the Anti-Kickback Act as enacted in 1946 to Acme's contract. *United States* v. *Barnard, supra,* involved a price redetermination contract with no ceiling price as distinguished from Acme's contract, which was subject to a ceiling price. That the *Barnard* case did not resolve the question as to whether the 1946 Act applied to the type of contract involved in the instant case is clearly evident from the legislative history of the 1960 amendment. H. Rep. 1880, 86th

[4] It is interesting to note that when the Comptroller General sent his recommendation to the Congress that the Anti-Kickback Act be amended to apply to all types of negotiated contracts, he noted that before the Act was enacted in 1946, "there was no specific statutory remedy for recovery by the Government of the amount of the kickback, and there was serious doubt as to the adequacy of common law remedies." H. Rep. 1880, 86th Cong., 2d Sess. 1960 (1960 U.S. Code Cong. & Adm. News, p. 3293).

Cong., 2d Sess., 1960. To apply the 1960 amendment retroactively to Acme's contract (which was the very contract which precipitated the 1960 amendment) would be manifestly unfair and inequitable.

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari presents no substantial question of such importance to warrant review of the decision of the court below. This litigation has been pending for a period of almost twelve years. All of the issues were thoroughly considered and disposed of by the Court of Claims. Respondent respectfully prays that the writ be denied.

Respectfully submitted,

JACK REPHAN
1120 Connecticut Avenue, N. W.
Washington, D. C.

RAYMOND R. DICKEY
1120 Connecticut Avenue, N. W.
Washington, D. C.

BERNARD GORDON
1120 Connecticut Avenue, N. W.
Washington, D. C.

Attorneys for Respondent

When restitution is sought, only those costs which are reasonable are recoverable. The limitation of recovery to reasonable costs insures that the result will be a fair and equitable one. It follows that there is no merit to the contention that awarding restitutional relief is unfair or inequitable simply because the damages may exceed the contract price.

Insofar as fairness is concerned, the Court should consider the facts of this case from Acme's point of view as well as from the government's. Relying upon the government's implied promise that it would do nothing to hinder, delay, or prevent performance of the contract, Acme in good faith incurred actual costs of over one million dollars in performing the contract [F. 60; App., p. 139]. For a period of almost twelve years Acme has been seeking recovery for the government's breach of contract. For almost twelve years the government has resisted payment of Acme's claim by all means available to it and has had the use of moneys rightfully belonging to the plaintiff.

The Court of Claims has decreed that the government shall have an opportunity to show that plaintiff's costs were excessive. Thus, at this juncture, the issue of fairness which the government attempts to interject into the case is not only meritless but it is also premature.

The first question presented by the petition is clearly without merit and involves no special or important reasons for granting a writ of certiorari as provided by Rule 19 of the Rules of this Court.

ARGUMENT II

The Ruling of the Court of Claims That the Discovery of Violations of the Anti-Kickback Act by Employees of Acme Did Not Justify the Government's Cancellation of the Contract Was Correct Under the Facts of This Case

The government contends that the Court of Claims' holding that the violations of the Anti-Kickback Act, 41 U.S.C. 51 *et seq.*, by Acme's employees did not justify a cancellation of the contract limits the scope of this Court's ruling in *United States* v. *Mississippi Valley Generating Co., supra,* commonly referred to as the *Dixon-Yates* case. Respondent submits, however, that the Court of Claims' ruling was proper and in no way dilutes the holding in *Dixon-Yates.*

This Court recognized that the contract in *Dixon-Yates* was "conceived in a tainted transaction" (364 U.S. at 565). However, as the Court of Claims found in Acme's case, "The kickbacks with which we are concerned * * * were in no way related to the negotiation and execution of Contract 1213, and do not affect its validity" [App., p. 15].

Of great significance is the fact that in *Dixon-Yates* the wrongdoings of the contractor's employees were imputable to the contractor. See *Carrier Corp.* v. *United States,* 328 F. 2d 328 (Ct. Cl., 1964). On the other hand, since Acme was "swindled by its own agents" and had nothing to gain from their actions, it cannot be charged with the violations of the act committed by its employees. 3 Fletcher, *Private Corporations,* § 826 (rev. ed. 1947); *Maryland Casualty Co.* v. *Tulsa Industrial Loan & Investment Co.,* 83 F. 2d 14 (C.A. 10, 1936).

Even though Acme was clearly victimized by its employees and even though Acme had no way to protect itself against "treacherous employees who are determined to commit morally reprehensible acts and who, for the sake of a few paltry dollars, set up the type of vicious scheme that has been set up in this case," the government asserts that it had a right to a decree of forfeiture of the entire prime contract. [See F. 30; App., p. 66.]

While the kickbacks could have resulted in increased costs to the government as well as to Acme unless some action were taken, the Court of Claims' decision requires Acme's recovery to be reduced by the amount of any kickbacks latently included in payments to its subcontractors. Therefore, the kickbacks will not cost the government a single cent. The policy expressed by Congress in the Anti-Kickback Act will therefore be fully abided by.

In holding that Congress, by giving the government only one civil remedy against contractors whose agents had received secret kickbacks, precluded the additional remedy of contract annulment, the Court of Claims applied a well-established rule of statutory construction—*inclusio unius est exclusio alterius.* Since Congress provided no civil remedy for a violation of the statute involved in *Dixon-Yates,* the two cases are obviously distinguishable.

Respondent submits that the civil remedy provided by the Anti-Kickback Act is adequate to relieve the taxpayers of the cost of any illegal kickbacks. If such is not the case, then it is submitted that amendatory legislation is required since it is not the function of

BLANK

PAGE

BLANK

PAGE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement:	
1. The facts:	
a. The contract and its termination	4
b. The kickbacks	7
2. Proceedings below	10
Summary of argument	13
Argument:	
I. Where responsible officials of a prime government contractor accept bribes from the subcontractors in violation of the Anti-Kickback Act, the government is entitled to cancel:	
A. The right to cancel a contract because of a statutory violation is properly implied when that remedy is necessary and appropriate to effectuate the statutory policies	17
B. The test of the *Dixon-Yates* case is met here: protection of the integrity of the procurement process requires that a contract tainted by kickback violations, like one tainted by a forbidden conflict of interest, be promptly terminated without liability to the government	20
II. To allow restitution in the circumstances of the present case—where damages would fully compensate the plaintiff for the loss he sustained as a result of the alleged breach—would offend sound principles of contract law and important federal policies governing procurement contracts	29

227-268—66——1

Arguments—Continued
A. Restitution is designed to provide a flexible, essentially equitable, remedy in situations where damages are not so accurate a measure of the injury caused by the breach as is the value of the services rendered under the contract to the defendant 32
B. Measured by sound principles of restitutionary relief, the contractor is not entitled to a recovery in excess of the damages he actually suffered as a result of the termination where, as here, there is no question of the adequacy of the damages remedy 36
C. Important federal policies would be impaired by allowing restitution in this case 42
Conclusion 46

CITATIONS

Cases:
Aberdeen Railroad Company v. *Blaikie Bros.*, 1 MacQueen's Appeal Cases, 461 24
Adams v. *Healy*, 227 Mich. 159, 198 N.W. 584 33
Bailey v. *Furleigh*, 121 Wash. 207, 208 Pac. 1091 35
Bank of the United States v. *Owens*, 2 Pet. 527 18
Boomer v. *Muir*, 24 P. 2d 570 (Cal. App.) 35
Brown v. *Bullock*, 294 F. 2d 415 18
Burck v. *Taylor*, 152 U.S. 634 18
City of London Electric Lighting Co. v. *London Corp.* [1903] A.C. 434 (House of Lords) 18
Cleveland, C.C. & St. L. Ry. Co. v. *Moore*, 170 Ind. 328, 82 N.E. 52 35
Connolly v. *Sullivan*, 173 Mass. 1, 53 N.E. 143 35
Crocker v. *United States*, 240 U.S. 74 18
Derby v. *Johnson*, 21 Vt. 17 33
Dickson v. *Emmerson*, 154 Ore. 558, 61 P. 2d 439 35
Fairport P. & E. R. Co. v. *Meredith*, 292 U.S. 589 18
Farnum v. *Kennebec Water District*, 170 Fed. 173 35
Finch v. *Riverside & A. Ry. Co.*, 87 Cal. 597, 25 Pac. 765 18
Fitzgerald v. *Pan American Airways, Inc.*, 229 F. 2d 499 18

Cases—Continued

Frost & Co. v. *Mines Corp.*, 312 U.S. 38 17
Gleason v. *Seaboard Ry.*, 278 U.S. 349 28
Heitz v. *Sayers*, 32 Del. 207, 121 Atl. 225 35
J. I. Case v. *Borak*, 377 U.S. 426 17
Johnston v. *Star Bucket Pump Co.*, 274 Mo. 414, 202 S.W. 1143 35
Keeler v. *Clifford*, 165 Ill. 544, 46 N.E. 248 35
Kehoe v. *Rutherford*, 56 N.J.L. 23, 27 Atl. 912 35
Kitchell v. *Crossley*, 90 N.J.L. 574, 101 Atl. 179 35
L. Albert & Son v. *Armstrong Rubber Co.*, 178 F. 2d 182 40
Mammoth Oil Co. v. *United States*, 275 U.S. 13 18
Massachusetts Bonding & Ins. Co. v. *United States*, 352 U.S. 128 42
McConnell v. *Commonwealth Pictures Corp.*, 7 N.Y. 2d 465, 166 N.E. 2d 494 18
Merritt v. *United States*, 267 U.S. 338 39
Missouri Pac. R.R. Co. v. *Ault*, 256 U.S. 554 ..... 42, 43
Miller v. *Ammon*, 145 U.S. 421 18
Montgomery, Matter of, 272 N.Y. 323, 6 N.E. 2d 40 35
Moses v. *MacFerlan*, 2 Burr. 1005 (Lord Mansfield) 32
Muschany v. *United States*, 324 U.S. 49 29
Nash v. *Towne*, 5 Wall. 689 32
New York Mail & Transp. Co. v. *United States*, 154 F. Supp. 271, certiorari denied, 355 U.S. 904 31
Northport v. *Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204 18
Noyes v. *Pugin*, 2 Wash. 653, 27 Pac. 548 35
Oakley v. *Duluth Superior Dredging Co.*, 223 Mich. 478, 194 N.W. 123 35
Pan American Co. v. *United States*, 273 U.S. 456 18
Paul v. *United States*, 371 U.S. 245 44
Peist v. *Richmond*, 97 Vt. 97, 122 Atl. 420 35
Pelletier v. *Masse*, 49 R.I. 408, 143 Atl. 609 35
Philadelphia v. *Tripple*, 230 Pa. 480, 79 Atl. 703 35
Reitmeister v. *Reitmeister*, 162 F. 2d 691 18
Reynolds v. *Levi*, 122 Mich. 115, 80 N.W. 999 35
Rodemer v. *Hazlehurst & Co.*, 9 Gill. 288 (Md.) 33
Rustles v. *Christensen*, 207 Wis. 326, 241 N.W. 635 35
Sanitary District v. *United States*, 266 U.S. 405 18
Southern Painting Company of Tenn. v. *United States*, 222 F. 2d 431 35

Cases—Continued
Standard Surety & Cas. Co. v. *Plantsville Nat. Bank*, 158 F. 2d 422, certiorari denied, 331 U.S. 812 ... 28
Stark v. *Magnuson*, 212 Minn. 167, 2 N.W. 2d 814 ... 35
Sutton v. *United States*, 256 U.S. 575 ... 39
Texas & Pacific Ry. v. *Rigsby*, 241 U.S. 33 ... 18
Thompson v. *Gaffey*, 52 Neb. 317, 72 N.W. 314 ... 35
Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 ... 17
United States v. *Barnard*, 255 F. 2d 583, certiorari denied, 358 U.S. 919 ... 28, 29
United States v. *Carter*, 217 U.S. 286 ... 24
United States v. *Minnesota Mutual Inv. Co.*, 271 U.S. 212 ... 39
United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 ... 11, 14, 15, 18, 19, 20, 24, 25, 26, 28
United States v. *Republic Steel Corp.*, 362 U.S. 482 ... 18
Valente v. *Weinberg*, 80 Conn. 134, 67 Atl. 369 ... 35
Wellston Coal Co. v. *Franklin Paper Co.*, 57 Ohio St. 182, 48 N.E. 888 ... 35
Wuchter v. *Fitzgerald*, 83 Ore. 672, 163 Pac. 819 ... 35

Statutes:
Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U.S.C. 51 ... 2, 3, 4, 6, 9, 10, 11, 12, 13, 14, 17, 20, 21, 23, 24, 28, 29
Buy American Act, 41 U.S.C. 10a, *et seq* ... 45
False Claims Act, 31 U.S.C. 231 ... 6, 7
Federal Tort Claims Act, 28 U.S.C. 2647 ... 42
Tucker Act, 28 U.S.C. 1491 ... 30, 31, 35, 39, 42, 43
10 U.S.C. 2304(g) ... 44
10 U.S.C. 2306(b) ... 6, 45
18 U.S.C. 201–218 ... 45
18 U.S.C. (1946 ed.) 202 ... 21
18 U.S.C. 434 ... 19
18 U.S.C. 874 ... 45
28 U.S.C. 1346(a)(2) ... 30
28 U.S.C. 2514 ... 45
Walsh-Healey Act, 41 U.S.C. 35, *et seq* ... 45
2A N. J. Stats. Ann., § 170–88 ... 29
N. Y. Penal Law (McKinney's), § 439 ... 29
18 Pa. Stat. Ann. (Purdon's), § 4667 ... 29

Miscellaneous:
32 C.F.R. (1966 ed.):
§ 7.103–11 ... 44

Miscellaneous—Continued
§ 7.103–21 ---- 44
§ 8.701(e) ---- 44
§ 8.707 ---- 44
§ 12.801 ---- 45
32 C.F.R. (1965 ed.):
§ 3.402(b) ---- 43
§ 3.405 ---- 43
§ 3.801–1 ---- 44
32 C.F.R. (1954 ed.):
§ 1.301 ---- 44
§ 3.401 ---- 43
§ 3.405 ---- 43
§ 3.405–1 ---- 43
§ 3.406 ---- 43
§ 3.406–1 ---- 43
§ 7.103–11 ---- 44
§ 7.103–21 ---- 44
§ 8.701(e) ---- 44
41 C.F.R. 1–12.800, *et seq* ---- 45
5 Corbin, *Contracts* (1964 ed.):
§§ 1054 *et seq* ---- 38
§ 1102 ---- 31
§ 1103 ---- 32
§ 1107 ---- 31
6A Corbin, *Contracts*, § 1373 (1962 ed.) ---- 18
Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L. J. 52 (1936) ---- 34
Hearings on H.R. 131 before House Committee on Expenditures in the Executive Department, 79th Cong., 1st Sess. ---- 21
H. Rep. No. 212, 79th Cong., 1st Sess ---- 21, 24
H. Rep. No. 1880, 86th Cong., 2d Sess ---- 9, 10, 20
Palmer, *The Contract Price as a Limitation on Restitution for Defendant's Breach*, 20 Ohio St. L. J. 264 (1959) ---- 34
Patterson, *Builder's Measure of Recovery for Breach of Contract*, 31 Col. L. Rev. 1286 (1931) ---- 34
II Restatement of Contracts (1932):
§ 347 ---- 18, 31, 33
§ 350 ---- 33
S. Rep. No. 1585, 86th Cong., 2d Sess ---- 9, 10

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 86

UNITED STATES OF AMERICA, PETITIONER

v.

ACME PROCESS EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims (R. 78) is reported at 347 F. 2d 509. Its findings (R. 123) are unreported. The opinion (R. 1) and findings [1] of the Commissioner of the Court of Claims are unreported.

JURISDICTION

The opinion of the Court of Claims (which includes its order, R. 123) was issued on June 11, 1965, and a timely motion for reconsideration denied on October 15, 1965 (R. 237). By orders of the Chief Justice

[1] Excerpts from the Commissioner's findings of fact are set forth at R. 62–77.

and Mr. Justice Brennan, entered on January 12, 1966, and February 9, 1966, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1966 (R. 238–239). The petition for a writ of certiorari was filed on that day and granted on April 25, 1966 (R. 240, 384 U.S. 917). The jurisdiction of this Court is conferred by 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the discovery that executives of a prime government contractor had accepted bribes from subcontractors in violation of the Anti-Kickback Act justified the government in terminating the prime contract.

2. Assuming that this was not adequate cause for termination and that the government therefore breached the contract, whether the contractor was entitled to restitution of the reasonable expenses he incurred under the contract, although the result (since the contract was not a profitable one for him) is to place him in a far better position than he would have occupied had the contract not been terminated.

STATUTE INVOLVED

Section 1 of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U.S.C. 51, provides in pertinent part:

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, * * * (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any de-

partment, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; * * * as an inducement for the award of a subcontract or order from the prime contractor * * * is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor * * *. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor * * * in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. * * *[2]

Section 4 of the Act provides:

Any person who shall knowingly, directly or indirectly, make or receive any such prohibited

[2] Prior to its amendment in 1960, 74 Stat. 740, the Act applied only to contracts "on a cost-plus-a-fixed-fee or other cost reimbursable basis." 60 Stat. 37. See Statement, *infra*, pp. 9–10.

payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

STATEMENT

1. THE FACTS

A. THE CONTRACT AND ITS TERMINATION

On January 27, 1953, the Army Ordnance Corps awarded the Acme Process Equipment Co. a contract for the manufacture of 2,751 75 mm. recoilless rifles (F. 13, R. 132).[3] Acme had not previously manufactured weapons, but desired to diversify into the military supply field in order to offset unevenness in its civilian business (F. 2, R. 124). It was awarded the contract primarily because it was the lowest bidder. Its bid was $337.23 per rifle; the competing bids ranged from $423 to $930.16 (F. 7, R. 126–127). In addition, the government desired to encourage the entry of a new competitor into the field (F. 10, R. 130–131). The government contracting officers were, however, concerned over Acme's ability to produce the rifle at its bid price, especially since it did not have previous experience in the field. Acme was offered the opportunity to withdraw its bid, but declined, and the contract was then awarded to it (F. 7, 10, 13, R. 126–127, 130–131, 132–133).

It was contemplated that the project would largely be subcontracted, "leaving for Acme only the final finishing and assembly of components, and the earlier job of fashioning the rifle barrels from rough forg-

[3] "F." refers to the Findings of the Court of Claims (R. 123–237).

ings with machines furnished by the Government under a separate facilities contract" (R. 79). Indeed, the price of the subcontract with All Metals Industries—$300,000—was almost one third the total contract price of $1.04 million (F. 13, 61 R. 132, 232), and All Metals participated in some of the negotiations over the prime contract (F. 19, R. 139). In assessing the feasibility of Acme's bid, the Army reviewed Acme's subcontracting plans (F. 10, R. 130), and, during the final stages of negotiation, Acme advised the Army of changes in those plans (F. 11, R. 131). The contract itself required Acme to obtain the approval of the government for all subcontracts of more than $25,000 (R. 257).

The contract proved unprofitable to Acme, in part because of Acme's inexperience (F. 41, R. 187–188). Its cost of production on initial deliveries was more than double the ceiling price specified in the contract (F. 52 (a), (c), R. 206, 207–208).[4] Although delivery schedules were extended, Acme fell behind and liquidated damages were assessed (F. 14, 46, R. 133, 199–200). By the end of July 1954, 1,163 rifles had been delivered (F. 14, R. 133) at an average cost of $877.77 per rifle.[5] The government paid for the rifles, as they were delivered, at the contract price (R. 64, 68, 255).

On July 22, 1954, shortly after learning that employees of Acme had received kickbacks from several

---

[4] The contract price of $337.23 per rifle was subject to redetermination up to $384.95 (F. 7, 13, R. 126, 132).

[5] This figure is based on the average costs of $1,179.29 for the first 446 and $690.21 for the remaining 717 rifles actually delivered (R. 110).

subcontractors (pp. 7–10, *infra*), the Army suspended the contract, and, a month later, cancelled it for "statutory violations" (F. 47, 49, R. 201, 202–204.) [6]

---

[6] In addition to the kickbacks, the Army found that Acme had violated the False Claims Act (31 U.S.C. 231) and was guilty of conspiracy and common-law fraud (F. 49, R. 200–203). The Army also determined that there had been violation of Acme's contractual and statutory warranty against contingent-fee arrangements (10 U.S.C. 2306(b)). These contingent fee arrangements, like the kickbacks, involved Tucker and Norris (see *infra*, pp. 7–10). Acme hired Tucker in October 1952 to solicit bid invitations from private firms and the government. It agreed to pay him a commission of 5 percent on resulting gross weekly sales up to $10,000 and 3 percent of sales over $10,000. Tucker agreed to split this commission with Norris. In its original bid, which was submitted by Norris as General Manager of Acme's Defense Work Department, and later, on December 18, 1952 (one month before award of the prime contract), Acme executed government forms which represented that Acme "has not employed or retained a company or person (other than a full-time employee) to solicit or secure this proposed Contract" (F. 5, 8(a), R. 125–126, 127). Subsequently, on March 2, 1953, Acme hired Tucker and Norris on a full-time basis, with part of their compensation dependent upon the receipts of the plant at which the government contract was to be performed. On May 18, 1953, in response to a question as to Tucker's status, Acme stated that he had been originally hired on a part-time commission basis, but as of "January 1953" (*i.e.*, the time Acme's contract was executed) had entered upon full-time, non-commission employment (F. 8(f), 9, R. 129–130). The fact that Acme had been in violation of its contractual warranty against contingent fees for at least the first two months of its performance of the contract was not disclosed in the letter (F. 8(f), R. 129).

While the Court of Claims affirmed the Army's determination that both the False Claims Act and the contingent-fee warranty had been violated, it held that neither violation afforded a ground for termination of Acme's contract. As to the contingent-fee violations, the court held that the govern-

B. THE KICKBACKS

In October 1952, prior to the negotiation of the contract with the Army, Acme had hired Harry Tucker, Jr., and his associate, James Norris, for the purpose of establishing and managing a new division of the company to handle government contracts. Norris was made general manager of production, with authority to submit bids, sign government contracts, and award subcontracts; Tucker was placed in charge of sales, government contracts, and expediting subcontract operations (F. 3, 16, R. 124–125, 138).

Before the execution of the prime contract Tucker entered into arrangements with three companies, under which he was to receive "commissions" (which he shared with Norris) on sales by these companies to customers procured by Tucker, including Acme (F. 18, 22, 23, R. 139, 144–146).[7] After entering into this "kickback" arrangement, one of these companies—All Metals Industries, Inc.—participated in negotiation conferences between Acme and the Army which led to the award of the prime contract (F. 19, R. 139).

---

ment's delay in cancelling after learning of the violations justified enforcement of the contract (R. 83–87). As to the False Claims Act, the court found that the government had not shown intent to defraud, and that such intent was necessary to justify nonenforcement on this ground (R. 102). We did not seek review of these aspects of the decision below.

[7] Tucker's contract with Foley Machine Company was limited to orders procured by Tucker from Acme (F. 23, R. 146). This contract was executed three days before the date of Acme's prime contract with the Army (F. 13, R. 132). Tucker's other two kickback contracts—signed in October and November 1952—were with All Metals Industries, Inc., and Manalapan Machine & Welding Works, and applied to any customer Tucker might bring in (F. 18, 22, R. 139, 144–145).

Within a few weeks after the award of the prime contract, all three companies were awarded subcontracts by Acme (F. 18, 19, 22, 23, R. 139–141, 144–146). A fourth company obtained subcontracts from Acme with the help of Tucker's father, with whom the company had a commission agreement (F. 24, R. 146–147), and a fifth obtained an Acme subcontract upon the recommendation of Philip Chagnon, who was on Acme's payroll as Norris' assistant. This company had a kickback agreement with Chagnon (F. 25, R. 147).

Within a month after the award of the prime contract, Jack Epstein, the superintendent of an Acme plant and the son of Acme's president and principal stockholder, joined the kickback conspiracy. Epstein and Tucker threatened cancellation of one of the subcontracts unless the subcontractor paid them $25,000. It was arranged that $23,500 would be paid to a dummy corporation owned by Tucker, Norris and Epstein for fictitious consulting services, and this amount was charged to Acme through an increase in the subcontract price (F. 1, 20, 21, R. 123–124, 141–144).[8]

Other officials of Acme were not consciously aware of the kickback activities of Epstein, Tucker, Norris and Chagnon until the late summer and fall of 1953 (F. 30, R. 149). However, Tucker's employment contract with Acme specifically stated that he represented and would continue to represent firms in other lines

[8] After the commencement of an official investigation of Norris' activities Tucker attempted to reverse the charge so that Acme would not bear the cost of the kickback (F. 21, R. 142–144).

of business and Acme did not consult with any of his other clients at the time Tucker was hired (F. 3, 5, R. 124–126). In addition, Army officials advised Acme that Tucker's father was suspected of "five-percenter" activities and that it was risky to hire Tucker; Joshua Epstein, Acme's president, ignored this advice (F. 8(d), 30, R. 128–129, 149). When Joshua Epstein ultimately came to suspect improper activities, he caused the resignation of the employees involved (F. 26–30, R. 147–149).[9]

Tucker, Norris and Jack Epstein were subsequently indicted for violation of the then Anti-Kickback Act, 60 Stat. 37 (F. 41, R. 149–150). After presentation of the government's case, the defendants' motion for acquittal was granted, on the ground that the Act—which at that time embraced only "cost-reimbursable" government contracts—did not apply to the Acme contract, a fixed-price contract with a provision for limited price redetermination. The district court stated that the defendants' conduct was "despicable and morally reprehensible, but unfortunately within the narrow letter of the law" (F. 54(j), R. 219–220).

Amendatory legislation was recommended by the Comptroller General (H. Rep. No. 1880, S. Rep. No. 1585, 86th Cong., 2d Sess.) and in 1960 the Act was amended to apply to all negotiated contracts including

[9] Jack Epstein's resignation, however, was delayed for nearly a year. During that time he replaced Norris as plant superintendent (F. 26, 29, R. 147–149). The Court of Claims found that the delayed resignation was "understandable in view of the relationship that existed" between Jack and Joshua Epstein (F. 30, R. 149).

contracts such as the one in this case (74 Stat. 740, 41 U.S.C. 51). This amendment was retroactive.[10]

2. PROCEEDINGS BELOW

In 1957, after failing to obtain an administrative settlement, Acme brought this action in the Court of Claims, alleging that the government's cancellation was a breach of contract and seeking "full restitution of its costs" or, alternatively, damages. Acme contended that the Army had used the statutory violations as an excuse to mask the real reason for cancellation—the fact that 75 mm. recoilless rifles had become obsolete (F. 47, R. 201). After full trial before a Commissioner, and extensive proceedings before the full court, the Court of Claims found that the obsolescence of the rifles and Acme's illegal activities were both reasons for cancellation and that either

[10] The original statute provided that the amount of any kickback, "whether heretofore or hereafter paid or incurred by the subcontractor," could not be charged under a subcontract and, if charged, was recoverable by the United States. 60 Stat. 37. The 1960 amendment, in extending the Act to all negotiated contracts, did not change this retroactive feature. 74 Stat. 740. The Comptroller General, in explaining his proposed amendment (which was enacted into law without material change), stated in a letter reprinted in the committee reports (H. Rep. No. 1880, *supra*, pp. 5–6; S. Rep. No. 1585, *supra*, p. 8):

> The proposed amendment does not disturb the retrospective feature of the act. It is not our intention, nor would it be practicable, for our Office to examine all contracts negotiated prior to the time the amendment may become law. However, in the event that current audits disclose kickback practices, the General Accounting Office should have the authority to take appropriate action with respect to violations under prior negotiated contracts

would have sufficed in the absence of the other (F. 50(a), R. 204–205). Moreover, the court found that the Army's decision to cancel for statutory violations, instead of invoking the contractual procedure for termination for convenience of the government, "was not controlled by considerations of termination costs, but rather by the Army's interest in promoting morality in public procurement" (F. 50(a), R. 204). The court therefore rejected Acme's contention that the government had acted in bad faith (R. 121–122).

a. The court found that Acme employees had accepted the kickbacks described above (F. 18–25, R. 139–147), but held that these activities did not justify cancellation of the contract. Hence, the government was liable for breach of contract for terminating the contract. The court reasoned that the Anti-Kickback Act provides for a specific civil remedy—recovery of the kickbacks—in addition to criminal sanctions, and that any further civil remedy is impliedly negatived. On this basis the court distinguished *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (the *Dixon-Yates* case), where violation of a conflict-of-interest statute that provided only a criminal remedy was held to justify cancellation of a government contract. The court also concluded that the statutory violations here, unlike those in the *Dixon-Yates* case, were not related to the negotiation and execution of the prime contract and consequently did not taint the entire transaction. The court further distinguished *Dixon-Yates* on the ground that the conspirators here

had defrauded Acme as well as the government (R. 87–94).[11]

b. With regard to Acme's remedy, the Commissioner of the Court of Claims had rejected Acme's contention that it was entitled to full restitution of its costs, and had held that the proper remedy was to award Acme the damages actually suffered as a result of the government's breach, *i.e.*, to place Acme in the financial position it would have attained had the government not cancelled the contract (R. 50–56). The Commissioner found that Acme would have recouped a portion (albeit not the whole) of its loss on the contract had it been permitted to complete performance (R. 74–75). Accordingly, he ruled that Acme should recover its post-cancellation expenses ($11,597) plus the difference between its loss on the completed portion of the contract ($673,053) and the amount it would have lost on the entire contract had it not been cancelled ($550,409). He thus recommended an award to Acme (exclusive of awards to its subcontractors) of $134,241 (R. 76).

The Court of Claims reversed the Commissioner's ruling on damages (R. 105–111). It held that Acme was entitled to be returned to its *status quo* before the contract, and, therefore, to restitution of the value of the services it had rendered under the contract. The value of these services was to be measured, not by the contract price, but by Acme's actual costs (which were

[11] The Court also deemed it relevant that, although the 1960 amendment to the Anti-Kickback Act—which was concededly intended to apply to prior events—clearly covered these kickbacks, the application of the original Act to the government contract here involved was "highly questionable" (R. 92–93).

greatly in excess of the contract price), except to the extent that the government could show that these costs were excessive.[12] The effect of this ruling is that Acme, which would have lost $550,409 if the contract had been fully performed, is to be made whole except insofar as the government can demonstrate that Acme's costs were excessive; and the government, which agreed to buy the 75 mm. rifles at a cost not to exceed $384.95 each, is (subject to the same reservation) required to pay approximately $877.77 per rifle.

SUMMARY OF ARGUMENT

Respondent (Acme) entered into a negotiated contract with the government to manufacture recoilless rifles. The project was to be largely subcontracted. Key employees of Acme, however, had received bribes from firms awarded major subcontracts, in violation of the Anti-Kickback Act, and the government cancelled the contract believing it to be tainted by the violations. The Court of Claims held (1) that the government was not entitled to cancel the contract for that reason and hence was guilty of breach of contract, and (2) that Acme was entitled by way of remedy therefor to restitution of the reasonable costs it had expended in performing under the contract, even though these costs were greatly in excess of any return Acme could have earned had completion of its per-

[12] Excessiveness was to be determined primarily by comparing "Acme's costs with those of other manufacturers of the same rifles during that period, taking into consideration that Acme should be permitted greater reimbursement than established manufacturers because of its inexperience and the anticipated benefits of its entry as a competitor" (R. 110).

formance not been prevented by the government's cancellation. We challenge both rulings of the Court of Claims—that the government committed a breach and that the restitutionary relief decreed by the court was a permissible remedy for the breach in the circumstances of this case.

I

It is established that the government may, without fault or liability, cancel a contract on the ground that it is tainted by illegal conduct, if such a remedy, although not specified in the statute making the conduct illegal, is nevertheless consistent with, and essential to, attainment of the statutory goals. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (the *Dixon-Yates* case). The present case satisfies this standard.

The cardinal vice at which the criminal proscription of subcontractors' kickbacks is aimed is the selection of subcontractors on grounds other than competitive merit, with the attendant danger (a substantial one since major procurement contracts typically involve substantial subcontracting) that the performance of the contract will be less adequate and less expeditious, and the contract price higher, than it would have been if bribery had played no role in the award of the subcontracts. Correction is not assured by the criminal sanction in the Anti-Kickback Act or by the provision for recover of the amount of the kickbacks (the only remedies expressly provided in the Act). Neither restores to the public the monetary equivalent (if, indeed, that could be ascertained) of the injuries it may have suffered as the result of the selection of the sub-

contractors on a corrupt basis. Frequently, the only assured means of extirpating the continuing effects of the corruption will be to terminate the agreement.

We stress finally that the fundamental purpose of the anti-kickback statute, like the conflict-of-interest statute involved in *Dixon-Yates*, is a prophylactic one. The remedy we invoke is essential to effective policing and deterrence of kickbacks. They are normally secret, and the prime contractor is in an immeasurably better position than the government to detect and prevent derelictions by his agents—if he has an incentive to do so. Only the threat of cancellation is likely to provide that incentive.

II

Assuming that the government was guilty of a breach of contract, the restitutional remedy prescribed by the Court of Claims was not justified. Restitution as a remedy for breach of contract is essentially equitable in nature. Its purpose is to supplement the conventional damages remedy in instances where damages are inadequate and relief measured by the breaching party's gain is just and proper. These are principally cases where for obvious reasons prorating the contract price falsely or inadequately measures the injury suffered by the innocent party. But that is not the situation here.

In the first place, the contract was unquestionably a losing one from Acme's standpoint. To allow restitution of its costs of performance would give Acme a windfall far in excess of the actual injury it sustained because of the government's cancellation. This is a punitive result incompatible with the basic pur-

pose of contract remedies—to protect the bargain struck by the parties. Secondly, the government's breach was an innocent one, grounded in a good-faith belief that it was entitled to cancel the contract because of the kickback and other violations that it had discovered. This makes the case especially inappropriate for a punitive award. Thirdly, Acme should not be heard to complain of being held to its contract measure of damages. It entered into the contract in full awareness of the considerable risk it was taking that the contract would prove unprofitable. It also assented to a termination-for-convenience provision under which the government could have cancelled for reasons sufficient unto itself without being liable for anything more than the actual damages thereby caused.

The Court of Claims' award of restitutionary relief here also runs counter to important federal policies. It has never been the policy of Congress to permit punitive judgments to be levied against the government; yet that is the practical consequence of the holding below. It is also settled policy to avoid cost reimbursable procurement contracts, under which the government's obligation is measured by the contractor's costs rather than by a fixed price established in advance by competitive bidding or negotiation. Finally, to hold the government to an enhanced liability in cases like this one will inevitably tend to discourage vigorous implementation of the various statutes designed to assure probity on the part of government contractors.

ARGUMENT

I. WHERE RESPONSIBLE OFFICIALS OF A PRIME GOVERNMENT CONTRACTOR ACCEPT BRIBES FROM THE SUBCONTRACTORS IN VIOLATION OF THE ANTI-KICKBACK ACT, THE GOVERNMENT IS ENTITLED TO CANCEL.

A. THE RIGHT TO CANCEL A CONTRACT BECAUSE OF A STATUTORY VIOLATION IS PROPERLY IMPLIED WHEN THAT REMEDY IS NECESSARY AND APPROPRIATE TO EFFECTUATE THE STATUTORY POLICIES

The Anti-Kickback Act forbids a subcontractor to pay a fee or gratuity to an officer or employee of a government contractor as an inducement to award the subcontractor a subcontract. 41 U.S.C. 51. The unmistakable purpose of this prohibition is to protect the integrity of federal procurement, in which subcontracting plays a major role.

The key employees of Acme responsible for the contract in this case violated the Anti-Kickback Act by awarding subcontracts to subcontractors who had bribed them. While the Act imposes a criminal sanction for its violation, and also permits the government to sue to recover the amount of any illegal kickbacks, it does not expressly authorize the cancellation of a contract under which illegal kickbacks have been made. The question is whether that additional remedy, although not affirmatively declared by the statute, is nonetheless available.

Courts have frequently found additional remedies to be implicit in the scheme of federal statutes. *Frost & Co.* v. *Mines Corp.*, 312 U.S. 38, 43. Thus, private rights to damages or injunctive relief are commonly inferred from regulatory enactments. *E.g.*, *J. I. Case* v. *Borak*, 377 U.S. 426; *Tunstall* v. *Brother-*

hood of Locomotive Firemen & Enginemen, 323 U.S. 210; *Fairport P. & E. R. Co.* v. *Meredith*, 292 U.S. 589; *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33; *Brown* v. *Bullock*, 294 F. 2d 415 (C.A. 2); *Fitzgerald* v. *Pan American Airways, Inc.*, 229 F. 2d 499 (C.A. 2); *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C.A. 2). Governmental injunctive remedies have likewise been inferred. *E.g.*, *Sanitary District* v. *United States*, 266 U.S. 405, 426; *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491–492. Cancellation of contracts tainted by illegal conduct is also a well recognized remedy allowable in appropriate cases though not expressly authorized by statute. *E.g.*, *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520; *Mammoth Oil Co.* v. *United States*, 275 U.S. 13; *Pan American Co.* v. *United States*, 273 U.S. 456; *Crocker* v. *United States*, 240 U.S. 74; *Burck* v. *Taylor*, 152 U.S. 634; *Miller* v. *Ammon*, 145 U.S. 421; *Bank of the United States* v. *Owens*, 2 Pet. 527; *City of London Electric Lighting Co.* v. *London Corp.*, [1903] A.C. 434 (House of Lords); *McConnell* v. *Commonwealth Pictures Corp.*, 7 N.Y. 2d 465, 166 N.E. 2d 494; *Finch* v. *Riverside & A. Ry. Co.*, 87 Cal. 597, 25 Pac. 765; *Northport* v. *Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204; II Restatement of Contracts (1932), § 347; 6A Corbin, *Contracts* (1962 ed.), § 1373.

The leading recent case on contract cancellation as an implied remedy for violation of a federal statute is *United States* v. *Mississippi Valley Generating Co.*, *supra* (the *Dixon-Yates* case). The government contract in that instance had grown out of a proposal

resulting from negotiations in which the government's representative had at the same time been an officer of a company that expected to profit from the transaction. Having initially found that this individual had violated a federal conflict-of-interest statute (18 U.S.C. 434), the Court next addressed itself to the question whether cancellation was permissible as an implied remedy for the violation. The Court declared that the proper test was "whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in" the statute and "that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment" (364 U.S. at 563). Finding that the "primary purpose" of the conflict-of-interest statute was "to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government" (364 U.S. at 563), it concluded (*ibid.*): "This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. * * * Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred."

The Court deemed irrelevant the fact that the contractor itself may not have known of, or been respon-

sible for, the illegal conduct. "Although nonenforcement frequently has the effect of punishing one who has broken the law, its primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction. [Citation omitted.] It is this inherent difficulty in detecting corruption which requires that contracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent." 364 U.S. at 564–565.

We believe these precepts are applicable in the present case as well.

B. THE TEST OF THE *DIXON-YATES* CASE IS MET HERE; PROTECTION OF THE INTEGRITY OF THE PROCUREMENT PROCESS REQUIRES THAT A CONTRACT TAINTED BY KICKBACK VIOLATIONS, LIKE ONE TAINTED BY A FORBIDDEN CONFLICT OF INTEREST, BE PROMPTLY TERMINATED WITHOUT LIABILITY TO THE GOVERNMENT

The *Dixon-Yates* decision lays down a simple and pragmatic test: the government may, without fault, cancel a procurement contract if such a step is necessary to effectuate the policies of the statute that has been violated. Applying that test here, we believe the government was entitled to cancel the Acme contract.

1. Congress recognized that, in view of the extent to which subcontracting is typically involved in the performance of government contracts,[13] bribes taken

[13] The Comptroller General's report to Congress, in recommending the 1960 amendment that broadened the coverage of the Act, pointed to the "enormous extent of subcontracting" involved in weapons contracts. H. Rep. No. 1880, 86th Cong., 2d Sess., p. 5. The Acme contract in issue here was largely subcontracted. See Statement, *supra*, pp. 4–5.

by purchasing officers of contractors in connection with the award of subcontracts undermine government procurement in essentially the same manner, and to a comparable degree, as bribes taken by the government's own purchasing officers. Accordingly, although the primary purpose of the anti-kickback bill originally proposed by the Comptroller General had been to provide a secure legal basis for recovering kickback payments discovered on audit,[14] Congress added to the bill a severe criminal penalty modeled upon that applicable to the bribery of government contracting officers.[15]

The analogy to bribery of government procurement officers is instructive with respect to the basic concerns that led Congress to attempt to prevent and punish kickbacks from subcontractors to prime government contractors. In both instances, there is substantial danger that the bribes or kickbacks will ultimately be paid by the government in the form of a higher contract price. But there is a greater danger—that

[14] H. Rep. No. 212, 79th Cong., 1st Sess., pp. 4–6 (report of Comptroller General, October 5, 1943).

[15] The penalty prescribed by the Act—a fine of $10,000 or two years imprisonment or both—is identical to the penalty prescribed in 1946 (when the Act was passed) for bribing a government employee to procure a government contract. 18 U.S.C. 202 (1946 ed.). The War Department witness who first suggested a criminal penalty at the congressional hearings stated that the statute regarding bribery of government contracting officers had been used as a model in drafting the suggested penalty. Hearings on H.R. 131 before House Committee on Expenditures in the Executive Departments, 79th Cong., 1st Sess., pp. 24, 25. The bill proposed by the Comptroller General contained no criminal penalty. *Id.*, pp. 1–2.

the contract, if it was conceived in corrupt dealings, will ill serve the government's needs.

The public interest in assuring that government contracts be awarded on the basis of merit need not be labored. The interest in assuring that prime government contractors award subcontracts on a merit basis stands on the same footing. Often, as here, the project contemplated by government procurement contract is largely subcontracted. If prompt, efficient, and economical performance of the contract is to be assured, it is essential that the subcontractors, no less than the prime contractor, be fully reliable. The feasibility of the contract, the likelihood that it can be completed for the contract price without upward redetermination, and even the amount that the prime contractor is willing to bid—all may depend upon his subcontracting arrangements. In recognition of their importance to the success of the contract, subcontractors are typically brought into the negotiations for the prime contract, and the government carefully reviews the prime contractor's subcontracting arrangements. Thus, in the present case the price of one of the subcontracts procured through a kickback represented almost one-third of the total price of the prime contract, and this subcontractor participated in the negotiation of the prime contract—as his stake in the total project warranted. (Statement, *supra,* pp. 4–5).[16]

[16] In light of the detailed finding of the Court of Claims on this point, its conclusion that the kickbacks "were in no way related to the negotiation and execution of [the prime contract]" (R. 94) appears unfounded.

A subcontractor who owes his subcontract to a kickback cannot be considered fully reliable. In selecting him, the prime contractor may have passed over far more competent firms. In addition, the price of the subcontract—and hence of the prime contract as well—may be inflated, and not merely by the amount of the kickbacks. A subcontractor who expects to obtain a subcontract by bribery has little incentive to stint in his estimates of cost and profit. The ordinary constraints of competition are absent where orders are awarded not on the basis of price and quality but because of kickbacks to officials of the prime contractor.

2. If we have correctly identified the principal evils of kickbacks from subcontractors to employees of prime government contractors, there can be little doubt that a government right of cancellation is a necessary adjunct to the remedies expressly prescribed by the Anti-Kickback Act, and one that should be recognized as implied in the Act. The express remedies are of themselves inadequate to provide an assured cure for the principal injurious consequences of kickbacks. The criminal sanction doubtless deters many from violating the statute; but in cases where, despite the criminal penalty, a bribe is given, punishment of the guilty persons leaves the ill effects of their illegal conduct intact. Those effects live on in the contract. If the government is bound to the contract, it has no remedy against either the unreliability of the subcontractors' performance or the possible inflation of the contract price incident to the method of letting the subcontracts.

The civil remedy provided by the Act—recovery of the kickbacks—is likewise incomplete. The price of the subcontract (reflected in the contract price) may well be greater, and the performance of the subcontractor less satisfactory, if the subcontract was awarded on the basis of bribery rather than competitive merit; and the result may be to increase substantially the real cost of the contract to the government. The full amount of the additional cost cannot, however, be recovered in a suit limited to the amount of the kickbacks.[17] Nor would a suit (assuming it were possible or feasible) against the corrupt individuals to recover damages for the injuries they caused the government be likely to provide complete relief, for those injuries are rarely measurable.[18] Additional remedies are thus necessary. Cancellation of the contract—which frees the government from further ob-

---

[17] The inadequacy of the civil remedy prescribed in the Act provides a complete answer, we think, to the view of the Court of Claims (R. 93–94) that a different result is warranted in this case from that in the *Dixon-Yates* case because the Anti-Kickback Act contains a civil as well as criminal sanction. Moreover, the legislative history contains no suggestion that the provision for recovery of the kickbacks was to be exclusive of all other civil remedies. Congress merely wished to assure that the right to such recovery would be available in addition to the remedies ordinarily recoverable against corrupt practices. H. Rep. No. 212, 79th Cong., 1st Sess., pp. 2, 5. Cancellation, as we have seen (p. 18, *supra*), is such a remedy.

[18] See *Aberdeen Railroad Company* v. *Blaikie Bros.*, 1 MacQueen's Appeal Cases, 461, 472, quoted in *United States* v. *Carter*, 217 U.S. 286, 306–307: "It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract [a contract involving an agent's conflict of interest] have been the best for the interest of the *cestui que trust*, which it was possible to obtain."

ligation under a contract whose terms may well be prejudicial to the public interest because of the kickback violations—will in many cases be the only adequate one.[19]

The case is similar to *Dixon-Yates.* Because the government's representative in the *Dixon-Yates* contract negotiations was guilty of a conflict of interest, there could be no assurance that the contract was in the public interest. Punishing the guilty person, or even recovering (had that been possible) the value of any benefit received by him, would not have protected the government if the contract was indeed tainted by the conflict of interest. Here, too, there is a conflict of interest.[20] The prime contractor's key employees, in awarding subcontracts, were hardly guided by the interest of the contracting parties; their self-interest

---

[19] It is no answer that in such cases the government should persuade the prime contractor to cancel the tainted subcontracts. Its efforts at persuasion may in many cases be wholly unavailing. It will frequently be prohibitively expensive for a contractor to change major subcontractors in midstream, so that his only practical course will be to let the tainted subcontracts stand—with the incidental consequence of providing profit to the subcontractors who committed commercial bribery in order to obtain the government's business. In this case, indeed, Acme—after discovery of the kickbacks—specifically agreed not to assert any defense of illegality against the claims of the principal subcontractor, All Metals, which had made a kickback (F. 64, R. 236–237).

[20] The illegality here is actually more flagrant than in *Dixon-Yates.* There the corruption was merely potential; the government negotiator had an interest in a potential subcontractor, but no actual corruption of judgment on his part was shown. Here bribes were actually solicited and received, and subcontracts were awarded to companies giving the bribes.

was served by eliciting graft from compliant subcontractors. Subcontracting being so dominant a characteristic of the contract, the result of this corruption of judgment was a contract whose performance from the government's standpoint is highly suspect.[21] The consequences of the corruption are not expunged merely by criminal punishment or civil recovery of the kickbacks and may indeed be impossible to measure. Cancellation of the contract is required to protect the public interest from any further injury under a contract negotiated in circumstances which raise a grave doubt whether it is consistent with the public interest.

3. An additional reason for allowing cancellation is the "inherent difficulty in detecting corruption." *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 565. Normally, of course, kickbacks are concealed. Detection is difficult. And the government is not well situated to determine whether employees of its contractors are taking bribes from subcontractors. Unless the contractor himself is vigilant in policing his employees and subcontractors, the statute is likely to be widely disobeyed. But without the threat of cancellation the contractor may have little incentive to root out kickbacks. He may indeed condone the practice, expecting to pass on to the government any additional costs he may incur.

---

[21] To be sure, the contract turned out to be a losing one for Acme. But that may prove no more than that Acme's costs were higher than anticipated—a circumstance which may be related to the selection of principal subcontractors on a corrupt basis.

The facts of the present case illustrate the importance of obtaining the contractor's active co-operation—through threat of cancellation—if there is to be an effective program of preventing kickbacks. Acme's officers (other than the conspirators) were found to have had no conscious knowledge of the kickbacks. However, had they thought the government would be entitled to cancel if it discovered kickbacks, and so been on their guard, they would doubtless have discovered them. Suspicious circumstances abounded (see Statement, *supra*, pp. 8–9).

The Court of Claims' suggestion that Acme should be exonerated from responsibility for the illegal kickback activities of its high-ranking executives on the ground that the executives intended to defraud Acme[22] (R. 88–89, n. 12) is thus wide of the mark. Kickbacks were taken by the general manager of Acme's chief plant (who was also the son of Acme's president and principal stockholder and a stockholder in his own right) and by the Acme officials in charge

---

[22] The Court of Claims' assumption that the aim of Tucker, Norris, and Epstein was to defraud Acme rather than the government is apparently based on the fact that Acme's costs were so far in excess of the maximum contract price that it would have been impossible to pass the kickback charges on to the government through price redetermination, even if the conspiracy had not been discovered. However, the kickback arrangements in this case were all made either before the prime contract was executed or within a few weeks thereafter (F. 18–25, R. 139–147), and at that time, surely, Acme did not realize it had a losing contract, else it presumably would not have signed it. And had it not been a losing contract, undiscovered kickbacks could have been passed on to the government through price redetermination—in which event Acme would not have been injured.

of operations, sales and government contracts (F. 16, 20, R. 138, 141). Having chosen these officials to conduct its government contract business, Acme may properly be held responsible for their actions in regard to that business even if designed to benefit themselves rather than Acme.[23] Any other rule would undermine the contractor's incentive to take steps to ensure the integrity of its employees.

In short, the root error of the decision below is its failure to recognize that the fundamental purpose of the anti-kickback statute, no less than the conflict-of-interest statute involved in *Dixon-Yates,* is a prophylactic one.[24]

---

[23] Cf. *Gleason* v. *Seaboard Ry.*, 278 U.S. 349, 357, where this Court held a railroad liable for its employee's issuance of a false bill of lading, ruling that "the agent's secret purpose to benefit himself by his breach of duty" was not ground for refusing to apply the principles of *respondent superior.* See, also, *Standard Surety & Gas Co.* v. *Plantsville Nat. Bank*, 158 F. 2d 422, 424–425 (C.A. 2), certiorari denied, 331 U.S. 812.

[24] We note briefly the Court of Claims' observation that it is "highly questionable" whether the kickbacks—which covered the period 1952–1954—violated the Anti-Kickback Act as originally enacted in 1946, since that Act applied only to "cost reimbursable" contracts, and the contract here was a fixed-price contract with a price redetermination clause (R. 93). It is clear that these kickbacks violated the Anti-Kickback Act as amended in 1960, and that the amendment was retroactive (see Statement, *supra*, p. 10, n. 10). We thus fail to see the relevance of the court's observation. In addition, we point out that the only appellate ruling on the question held the original 1946 Act applicable to price redetermination contracts. The 1946 Act applied where the prime contract was "on a cost-plus-a-fixed fee or other cost reimbursable basis." 60 Stat. 37. *United States* v. *Barnard*, 255 F. 2d 583, 588 (C.A. 10), certiorari denied, 358 U.S. 919, held the 1946 Act applicable to a price redetermination contract, as an "other reimbursable basis contract." To be sure, as the Court of Claims pointed out (R. 93), in *Barnard* the

II. TO ALLOW RESTITUTION IN THE CIRCUMSTANCES OF THE PRESENT CASE—WHERE DAMAGES WOULD FULLY COMPENSATE THE PLAINTIFF FOR THE LOSS HE SUSTAINED AS A RESULT OF THE ALLEGED BREACH—WOULD OFFEND SOUND PRINCIPLES OF CONTRACT LAW AND IMPORTANT FEDERAL POLICIES GOVERNING PROCUREMENT CONTRACTS

If we are correct in Point I—that the government acted within its prerogatives in cancelling the contract with Acme—no question of remedy remains. In this part we assume that there was a breach and address ourselves to the question of the proper remedy.

Tenth Circuit emphasized that the prime contract contained no limitation on the range of price revision. However, this fact was not crucial to the Tenth Circuit's holding. The court reasoned (255 F. 2d at 588):

> [The contract] partook of both aspects. It was in substance and effect a fixed price and "other reimbursable basis contract". And partaking in part of an "other reimbursable basis contract", it came within the range of [the Act].

Similarly, Acme's contract—despite the ceiling on price redetermination—"partook of both aspects." Moreover, the reason for the limitation in the 1946 Act to cost-reimbursable contracts is that, under such contracts, kickbacks may be charged through to the government. In the present case, at the time the kickback conspiracy was formed, the individuals involved had every reason to expect that the kickback would be charged through to the government (see n. 22, *supra*).

Moreover, the kickbacks were undoubtedly in violation of State law, regardless of the nature of the prime contract. The kickbacks took place primarily in Pennsylvania, with some events occurring in New Jersey and New York. All three States have statutes prohibiting commercial bribery of this kind. 18 Pa. Stat. Ann. (Purdon's), § 4667; New York Penal Law (McKinney's), § 439; 2A N.J. Stats. Ann., § 170–88. And there can be no doubt that the kickbacks violated "obvious ethical or moral standards." *Muschany* v. *United States*, 324 U.S. 49, 66–67.

Under conventional principles of contract law, the successful plaintiff in an action for breach of contract will, in many cases, be permitted to elect among remedies. He may ask for specific performance of the terms of the contract (a remedy not in issue here).[25] Alternatively he may ask for damages—that is, to be placed in the same position he would have occupied had the contract been fully performed—and thereby recover the profit he would have made but for the breach. Assuming that the government breached the contract here, we grant that Acme is entitled to damages, for the evidence shows that, had the contract been fully performed, Acme would have recouped about 20 percent of the heavy losses it sustained on the rifles it delivered prior to the breach (see Statement, *supra*, p. 12).

There is a third remedy frequently available, at least where, as in the present case, the breach prevented the other party from completing his performance under the contract—that of restitution.[26] The measure of restitutionary relief is the value of the partial performance. The theory is that the victim of a breach has a claim to be placed, if he chooses, in the position he occupied before the contract was

---

[25] A government contractor is normally not entitled to such relief, owing to the standard provisions of government contracts and the limitations on the jurisdiction of the courts in contract suits against the United States. See 28 U.S.C. 1346 (a) (2), 1491.

[26] We deal here with restitution as a remedy for breach of contract. It is, of course, frequently granted in cases of "quasi-contract"—as where benefits have been received by mistake or under a contract that cannot be enforced because it violates the Statute of Frauds.

made, as distinguished from the position he would have attained had the contract been fully performed. *E.g.*, II Restatement of Contracts (1932), § 347, *Comment b;* 5 Corbin, *Contracts* (1964 ed.), § 1102, p. 548; § 1107, p. 573. Hence, if, by performing his obligation under the contract until prevented from continuing by the breach of the other party, the victim conferred a benefit upon the other, he may demand that the monetary equivalent of that benefit be restored to him.

Applying this reasoning, the Court of Claims held that Acme should be awarded the value of Acme's services less the payments already made. The court also ruled that the value of the services was to be measured by the costs (unless shown to be excessive) incurred by Acme. These costs far exceeded both the contract rate and Acme's damages. Under this ruling Acme stands to recover an amount far larger than its actual damages or even the total price of the uncompleted portion of the contract.

We believe that the Court of Claims' grant of restitutionary relief contravenes sound principles of general contract law and important federal procurement policies. This is not to suggest that restitution is never available as a contract remedy in suits under the Tucker Act. We urge no such principle. See, *e.g., New York Mail & Transp. Co.* v. *United States,* 154 F. Supp. 271 (Ct. Cl.), certiorari denied, 355 U.S. 904. On the other hand, we think the remedy should not be applied where the damages remedy is adequate to compensate the plaintiff for all the loss he has suffered as a result of the breach, and

where restitution would place the plaintiff in a better position than he would have attained had the contract been completed.

A. RESTITUTION IS DESIGNED TO PROVIDE A FLEXIBLE, ESSENTIALLY EQUITABLE, REMEDY IN SITUATIONS WHERE DAMAGES ARE NOT SO ACCURATE A MEASURE OF THE INJURY CAUSED BY THE BREACH AS IS THE VALUE OF THE SERVICES RENDERED UNDER THE CONTRACT TO THE DEFENDANT

The traditional common law remedy for breach of contract was damages. In some respects, however, it was a rather rigid remedy that was inadequate to do justice in all situations. Restitution, like specific performance and other equitable remedies, arose in response to the need for greater remedial flexibility. See *Nash* v. *Towne,* 5 Wall. 689; *Moses* v. *MacFerlan,* 2 Burr. 1005 (Lord Mansfield); 5 Corbin, *supra,* § 1103. An example will illustrate the kind of problem that restitution (as a remedy for breach of contract, see note 26, *supra*) was designed to meet.

Suppose *A* employs *B* as his valet for one year, under a contract which provides that *B* shall receive $5,000 at the end of the year. After six months *A* wrongfully discharges *B,* who promptly takes another job as a valet at the same salary. If *B* sues *A* for damages, he can presumably recover only $2,500—the contract price less what he earned doing the same work for someone else for the balance of the contract period. Suppose, however, that the fair value of the service rendered *B* to *A* during the six months before the wrongful discharge was $3,000. Should *B* be permitted to sue, not for the contract price, but for restitution of the value of the service rendered—$3,000? The answer is yes. *B* bargained for a year's

employment—not six months. He was willing to work for $5,000 for one year but may well not have been willing to work for half that amount for six months. To give him merely a prorated share of the contract price—the practical result of awarding him damages—is thus to give him less than he bargained for. See II Restatement of Contracts, § 347, *Illustration* 2, p. 589.

Or suppose a building contractor begins a project but, before he can complete it, the owner wrongfully terminates the contract. To award the contractor only a prorated share of the contract price would ignore the possibility that, had he been allowed to complete the project and so earn the entire contract price, he might have made a greater profit by reducing his costs in the later stages of his performance. See *Rodemer* v. *Hazlehurst & Co.*, 9 Gill. 288 (Md.); *Adams* v. *Healy*, 227 Mich. 159, 198 N.W. 584; *Derby* v. *Johnson*, 21 Vt. 17.

In both types of situation (and we note that employment and building contracts appear to be the types most frequently involved in contract restitution cases) the traditional remedy is not adapted to measuring accurately the extent of the loss suffered by the innocent party as the result of the breach. In both situations, moreover, the plaintiff has rendered the defendant valuable services in performing his obligation under the contract until prevented from continuing by the latter's wrongful action. It is fair and just that the defendant be required to restore to the plaintiff the value of the services rendered, rather

than that the plaintiff be remitted to a damages remedy that is likely to be inadequate to redress the injury caused by the breach. See Patterson, *Builder's Measure of Recovery for Breach of Contract*, 31 Col. L. Rev. 1286, 1302.

We view restitution, then, as a supplement to the conventional damages remedy, flexible and essentially equitable in its nature and purposes, and appropriately invoked where damages are inadequate to compensate the aggrieved party for the loss of his bargain.[27] See Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 75–80; Palmer, *The Contract Price as a Limitation on Restitution for Defendant's Breach*, 20 Ohio St. L. J. 264, 278–279. Thus viewed, the availability of restitution cannot be reduced to a hard-and-fast rule applicable in all circumstances. We accordingly suggest no such rule. We are content to show that the policy and rationale of restitutionary relief, as we conceive it, do not support permitting the plaintiff to recover his costs of performance where damages are completely adequate to compensate him for the loss resulting from termination of the contract and restoration of his costs

[27] That inadequacy of the damages remedy is the true rationale of restitutionary relief is indicated by the fact that, when the innocent party has completed performance prior to the breach, he cannot ask restitution, but is limited to damages based upon the contract price. II Restatement of Contracts, § 350. For it is only where performance has been interrupted due to the breach that the problem of prorating the contract price—a solution likely to be inadequate to measure the full extent of the innocent party's loss—arises.

would give him a pure windfall. That, as we show, is the case here.

A caveat is necessary. We do not claim that the concept of restitutionary relief advanced herein would commend itself to every State court. Some might allow restitution in the circumstances of this case,[28] while others probably would not.[29] In adapting the law of restitution to actions upon government contracts under the Tucker Act, this Court is not, of course, bound by the views of particular States. We urge the Court to hold that the essence of restitutionary relief, soundly conceived, is recognition that the normal remedy for breach of contract is to give the innocent party the value of the bargain he struck

[28] See *Philadelphia* v. *Tripple*, 230 Pa. 480, 79 Atl. 703; *Johnston* v. *Star Bucket Pump Co.*, 274 Mo. 414, 202 S.W. 1143; *Connolly* v. *Sullivan*, 173 Mass. 1, 53 N.E. 143; *Valente* v. *Weinberg*, 80 Conn. 134, 67 Atl. 369; *Boomer* v. *Muir*, 24 P. 2d 570 (Cal. App.); *Southern Painting Company of Tenn.* v. *United States*, 222 F. 2d 431 (C.A. 10); *Heitz* v. *Sayers*, 32 Del. 207, 121 Atl. 225; *Matter of Montgomery*, 272 N.Y. 323, 6 N.E. 2d 40; *Stark* v. *Magnuson*, 212 Minn. 167, 2 N.W. 2d 814; *Pelletier* v. *Masse*, 49 R.I. 408, 143 Atl. 609; *Peist* v. *Richmond*, 97 Vt. 97, 100, 122 Atl. 420, 421; *Thompson* v. *Gaffey*, 52 Neb. 317, 72 N.W. 314; *Rustles* v. *Christensen*, 207 Wis. 326, 241 N.W. 635.

[29] See *Oakley* v. *Duluth Superior Dredging Co.*, 223 Mich. 478, 194 N.W. 123; *Reynolds* v. *Levi*, 122 Mich. 115, 80 N.W. 999; *Kehoe* v. *Rutherford*, 56 N.J.L. 23, 27 Atl. 912; *Kitchell* v. *Crossley*, 90 N.J.L. 574, 101 At. 179; *Farnum* v. *Kennebec Water District*, 170 Fed. 173 (C.A. 1) (applying law of Maine); *Keeler* v. *Clifford*, 165 Ill. 544, 46 N.E. 248; *Cleveland C., C. & St. L. Ry. Co.* v. *Moore*, 170 Ind. 328, 341–343, 82 N.E. 52, 56–57; *Wuchter* v. *Fitzgerald*, 83 Ore. 672, 163 Pac. 819; *Bailey* v. *Furleigh*, 121 Wash. 207, 208 Pac. 1091; *Noyes* v. *Pugin*, 2 Wash. 653, 27 Pac. 548; *Wellston Coal Co* v. *Franklin Paper Co.*, 57 Ohio St. 182, 48 N.E. 888; *Dickson* v. *Emmerson*, 154 Ore. 558, 562, 61 P. 2d 439, 441.

and no more, and that a different measure of relief is appropriate only where the traditional remedy is inadequate for this purpose.

B. MEASURED BY SOUND PRINCIPLES OF RESTITUTIONARY RELIEF, THE CONTRACTOR IS NOT ENTITLED TO A RECOVERY IN EXCESS OF THE DAMAGES HE ACTUALLY SUFFERED AS A RESULT OF THE TERMINATION WHERE, AS HERE, THERE IS NO QUESTION OF THE ADEQUACY OF THE DAMAGES REMEDY

We think the circumstances of this case are such that to allow restitutionary relief as decreed by the Court of Claims would distort the policy and rationale of the restitution remedy under general contract principles. The cardinal circumstances are as follows.

1. In retrospect, it is indisputably clear that Acme entered into an unprofitable contract. Even had it been permitted to complete performance, it would have made no profit, albeit it would have reduced its losses. There is no ambiguity on this point. The record indicates clearly what Acme lost on the rifles it delivered to the government and what it would have earned on the remaining rifles. Plainly, it could not have recouped its earlier losses over the remaining life of the contract. Assuming—as we do throughout this part of our argument—that the government breached the contract in cancelling for statutory violations, we agree that Acme is entitled to recover the net sums it would have received on the remaining rifles, *i.e.*, those it was unable to deliver because of the government's termination. But we see no justification for awarding Acme the much larger sum representing its costs of producing the rifles that it did deliver under the contract—even assuming that

those costs were not excessive and that they may fairly be equated with the value received by the government from Acme's partial performance.

There can be no contention, in this case, that the contractor's remedy in damages would not adequately measure the loss it suffered as a result of the breach. We do not urge that damages here be measured simply by prorating the contract price, ignoring the consideration that declining costs over the life of the contract would have enhanced its profitability to the contractor. Precisely such a computation of declining costs was made; it formed the basis of the Commissioner's award of damages, which we believe provided the appropriate and complete relief for the injury caused by the breach. Nor is this a case where it can be cogently argued that limiting the plaintiff to the contract price gives him less than he bargained for. The contract price was computed according to the unit of production. It was simply the product of multiplying the number of rifles by the price of each individual rifle. To be sure, had fewer units been specified in the contract, Acme might have made a higher bid in recognition that its initial production costs were likely to be disproportionately high. But, to repeat, the Commissioner took full account of this factor in awarding Acme damages representing the sums it would have recouped on subsequent deliveries.

Finally, this is not a case where it is unfair to subject the plaintiff to the burden of proving his future costs as a basis for damages recovery. The contract contemplated that the contractor would be able to furnish reliable estimates of future costs in connection with price determination (R. 254–255). Acme's own ac-

countants accordingly were able to furnish detailed estimates (R. 206)—which were largely accepted by the Commissioner.

Since the damages awarded by the Commissioner would place Acme in the position it would have attained had no breach occurred, there is no justification for awarding Acme the greatly enhanced sum representing the costs it incurred in producing the rifles delivered under the contract. Such an award would give Acme a pure windfall. It would go much further than to repair the injury suffered by Acme as a result of the cancellation of the contract; it would repair the mistake Acme made when it entered into a losing contract. The short of it is that Acme incurred costs far in excess of the contract price not because the government cancelled the contract, but because of its own managerial mistakes and entrepreneurial fortunes. In these circumstances, restitution of costs cannot realistically be regarded as a remedy for the breach; it is punishment meted out to the breaching party. To punish for breach of contract cuts deeply against the grain of traditional contract principles.[20] We submit it is not a proper office for restitution or any other remedy for breach of contract.

It is no answer that, the government having breached, the contract must be treated as rescinded and adjustment made irrespective of its terms. The contract is the very basis of the restitution action; without the breach of the contract, there would be no

---

[20] Under settled principles of contract law, the parties to a contract cannot prescribe penalties for its breach. *E.g.*, 5 Corbin, *supra*, §§ 1054, *et seq.*

cause of action. Furthermore, if restitution here is not viewed as a remedy upon the contract, but as a remedy sounding in quasi-contract or *quantum meruit*, no recovery is possible against the government under the Tucker Act, 28 U.S.C. 1491; *United States* v. *Minnesota Mutual Inv. Co.*, 271 U.S. 212, 717; *Merritt* v. *United States*, 267 U.S. 338; *Sutton* v. *United States*, 256 U.S. 575, 581.

Nor is it an answer that the government, having received a benefit from Acme, should be required to pay for it according to Acme's costs. The value to the government was not the cost to Acme, even assuming that cost was a fair one, but the contract price. There is nothing to indicate that the government would voluntarily have paid Acme two or three times the contract price for these rifles, albeit it desired to encourage entry of new competitors into the military-supply field. It might well have concluded that such an investment would be unwarranted, and that the money could be spent to greater advantage on other weapons. Or it might have decided to procure the rifles from other contractors—as it could have done at prices only slightly higher than the maximum contract price in the Acme contract.[21] There is, in sum, no basis for the view that the government was unjustly enriched because Acme spent

[21] The ceiling price of the contract with Acme was $384.95 per rifle (F. 7, R. 126). The government had received a bid of $452.60 from another contractor who was successfully producing rifles, and bids from other firms at $423, $484 and $684 respectively (F. 7, R. 126–127).

more than it anticipated in the production of these rifles."[32]

2. Even if, contrary to our suggestion, a punitive measure of damages for breach of contract may in some circumstances be warranted, surely it is not in a case like this, where the breach was neither wanton nor deserving of censure. The Court of Claims found that the government believed in good faith that the statutory and contractual violations of Acme and its employees warranted cancellation. If the government erred in that conclusion, the error was an innocent one. Certainly the government was the less culpable party in the course of events that led to the cancellation of the contract: The precipitating cause of the cancellation was the unethical and illegal conduct of key Acme employees. In view of the basically equitable nature of the restitution remedy, we think it important to stress the actual balance of equities in this case—and the highly technical sense in which the government, because it cancelled the contract, may be said to have acted wrongfully.

---

[32] Compare *L. Albert & Son* v. *Armstrong Rubber Co.*, 178 F. 2d 182 (C.A. 2) (L. Hand, J.), which held that a seller of machinery who had breached by delaying delivery could deduct the buyer's loss on the contract from its recovery for expenses in preparing his factory for receiving the machines (which were never delivered). Under this well settled rule, if the plaintiff's expenses confer no benefit on the defendant, the plaintiff is not entitled to recovery in excess of his actual damages. It seems anomalous that if, as here, the plaintiff's expenses confer *some* benefit, he is entitled to recover his entire expenses though they are grossly disproportionate to the value of the benefit conferred. Hence, even if this Court concludes that the doctrine of restitution is applicable here, we urge it to reject the *measure* of restitutionary relief (costs) applied by the Court of Claims.

In this connection, we point out that Acme entered into this contract with full awareness of the risks involved. Indeed, the government had offered it a chance to withdraw its bid—which was so low as to raise doubts concerning Acme's ability to perform without loss—but Acme had declined, its eagerness to become a military supplier impelling it to enter upon a contract it knew to be risky. We also note that the contract contained a price redetermination clause, under which Acme might obtain payment above the contract price if its costs proved to be higher than anticipated; and most pointedly, that the contract contained a provision authorizing the government to terminate the contract "whenever the Contracting Officer shall determine that such termination is in the best interests of the Government." (R. 247.)

Had the government invoked this clause in cancelling the contract—as it was entitled to do on any ground—its maximum liability to Acme in termination costs would not have exceeded the amount adjudged by the Commissioner to be Acme's damages for breach of contract. (Compare F. 48, R. 202, with Commissioner's finding 84, R. 76.) Acme had in effect agreed that the government could at any time cancel the contract for reasons sufficient unto itself without being liable for any more than the actual damages caused by the cancellation. The government, to be sure, did not invoke this clause, believing that it was entitled to cancel the contract because of statutory violations without any liability. But, in view of its initial assent to inclusion of the termination-for-convenience provision, Acme has no equity in

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed.

THURGOOD MARSHALL,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
RICHARD A. POSNER,
Assistant to the Solicitor General.
DAVID L. ROSE,
ROBERT V. ZENER,
Attorneys.

AUGUST 1966

U.S. GOVERNMENT PRINTING OFFICE: 1966

BLANK

PAGE

claiming a larger judgment than that clause allows for a government cancellation without cause—merely because the government reasonably and in good faith believed that it *had* cause.

C. IMPORTANT FEDERAL POLICIES WOULD BE IMPAIRED BY ALLOWING RESTITUTION IN THIS CASE

Even if, as a matter of sound general contract principles, restitution is allowable in a case like this, we think it should be disallowed on policy grounds arising from the nature of government procurement contracts.

1. As noted in the preceding discussion, the Court of Claims would give Acme an award that is clearly punitive, in that it is grossly disproportionate to the actual injury sustained by Acme as a result of the government's breach. (That injury was the much smaller amount representing the sums Acme would have recaptured on the undelivered rifles.) Such an award of punitive damages contravenes the basic principles of contract remedies, but it is particularly anomalous where the defendant is the government. It is unsound to suppose that, by subjecting the government to suit for breach of contract, Congress in the Tucker Act intended to open the government to punitive judgments. In the context of suits against the government, the remedy accorded by the court below is unprecedented (see R. 106).[22]

[22] Compare 28 U.S.C. 2647 (Tort Claims Act); *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128. See, also, *Missouri Pac. R.R. Co.* v. *Ault*, 256 U.S. 554, 563-565, holding that a statute subjecting the government, as owner and operator of the nation's railroads during World War I, to "all laws and liabilities as common carriers," did not authorize recovery

2. Where, as in the present case, restitution is applied so as to yield damages far in excess of those possible under conventional remedies for breach of contract, it becomes fictional to speak of the action as one upon the contract. The breach, to be sure, is the trigger that allows the restitution remedy to be invoked, but the remedy itself is independent of (if not contrary to) the terms of the contract. In such a case, the action realistically is one sounding in quasi-contract or *quantum meruit*—an action for the value of goods received without reference to a legal contract. The Tucker Act does not authorize such actions (see p. 39, *supra*).

3. The rule of damages applied by the Court of Claims has the effect of giving the contractor an option, in the event of the government's breach, of placing his contract on a full cost reimbursable basis. This new rule violates established federal procurement policies and regulations, which require government supplies and services to be purchased so far as possible on a fixed-price basis.[34] The federal policy in favor of fixed-price contracts is also expressed in

---

of a civil penalty. "The purpose for which the Government permitted itself to be sued was compensation, not punishment." 256 U.S. at 564.

[34] The present regulation states: "whenever a reasonable basis for firm pricing exists * * *, the firm fixed-price contract shall be used, because its use under these circumstances will provide the contractor with a maximum profit incentive to control the costs of performance." 32 C.F.R. 3.402(b) (1965 ed.). The regulations in effect in 1953, when the contract here involved was executed, required use of fixed price contracts for negotiated procurements "unless conditions necessitate" otherwise. 32 C.F.R. 3.401 (1954 ed.). See, also, 32 C.F.R. 3.405 (1965 ed.); 32 C.F.R. 3.405, 3.405–1, 3.406, 3406–1 (1954 ed.).

the standard default and termination-for-convenience clauses, which were included in the contract in this case (R. 244–253) although not invoked by the government. These clauses limit the contractor's recovery by reference to the contract price (see pp. 41–42, *supra*).[35] A rule of recovery that enables the contractor to disregard the contract price in recovering for his costs in excess of the contract rate stands in square conflict with this fixed-price policy preference.

At the same time, the measure of recovery prescribed by the Court of Claims frustrates the federal procurement policy of encouraging the award of contracts on the basis of competitive bids, or, where that is not feasible, of obtaining as many quotations for negotiated contracts as possible in order to secure the most advantageous terms for the government. See 10 U.S.C. 2304(g); 32 C.F.R. 3.801–1 (1965 ed.); cf. 32 C.F.R. 1.301 (1954 ed.). See, also, *Paul* v. *United States*, 371 U.S. 245, 252–253. The result of the Court of Claims' ruling is to allow Acme compensation far in excess of both its own bid and of the higher competing bids. Acme was awarded the contract, after competitive quotations were obtained, at a price of $337.23 per rifle, subject to upward or downward re-

[35] The standard default clause states that if the government's termination for default is improper because the contractor's default was excusable, or if there was no default, recovery shall be measured by the termination-for-convenience clause. 32 C.F.R. 7.103–11 (1954 ed.); 32 C.F.R. 7.103–11, 8.707 (1966 ed.). That clause specifies that the contractor is to receive the contract price for items delivered, plus its costs for uncompleted portions of the contract limited by reference to the contract price. 32 C.R.F. 7.103–21, 8.701(e) (1954 ed.); 32 C.F.R. 7.103–21, 8.701 (e) (1966).

vision, with a ceiling price of $384.95 (F. 7, R. 126–127). Other bids of $423, $484.05 and $684 per rifle were rejected (F. 7, R. 126–127). Under the Court of Claims' ruling, however, the government is to be charged Acme's costs of $1,179.29 for each of the first 446 rifles it received and $690.21 for the remaining rifles delivered prior to cancellation (F. 52, R. 206, 207–208), except to the extent that it can show these costs to have been excessive or illegal.

4. Government contracting officers have a broader duty with respect to public contracts than do private parties. A private party will repudiate his contract only if the contract appears disadvantageous. But a government officer is charged with enforcing the federal statutes and regulations designed to further important federal policies in procurement, and he may thus be authorized to cancel a contract because the contractor has violated such a statute or regulation. A breach of contract based upon an innocent but erroneous application of this principle cannot be likened to the self-interested action of a breaching private party. To impose punitive damages for a breach of the former sort is to deter government contracting officers from vigorous use of the cancellation power to foster important federal policies such as equal opportunity, honesty and fair dealing.[36]

---

[36] See, *e.g.*, 10 U.S.C. 2306(b) (contingent fees); 18 U.S.C. 201–218 (bribery, graft, conflicts of interest); 28 U.S.C. 2514 (fraudulent claims); 41 U.S.C. 35, *et seq.* (Walsh-Healey Act); 41 C.F.R. 1–12.800, *et seq.*; 32 C.F.R. 12.801, *et seq.* (non-discrimination in employment); 18 U.S.C. 874 wage rebates); 41 U.S.C. 10a, *et seq.* (Buy American Act).

BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 86

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY, *Respondent*

BRIEF FOR RESPONDENT

JACK REPHAN
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

RAYMOND R. DICKEY
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

BERNARD GORDON
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

BLANK

PAGE

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	4
1. The Facts:	4
A. The Contract and Its Cancellation	4
B. The Kickbacks	6
2. Proceedings Below	9
Summary of Argument	12
Argument	15
I. Where Employees of a Prime Government Contractor Receive Kickbacks From a Subcontractor, Without Knowledge of the Prime Contractor, in Violation of The Anti-Kickback Act, The Government Has No Right to Cancel	15
A. The right to cancel a contract because of a statutory violation can be implied only where the contract was made in violation of the statutory prohibition	15
B. The test of the Dixon-Yates case has not been met here since Acme's prime contract was not made in violation of the Anti-Kickback Act; in any event the Anti-Kickback Act gave the Government no right to cancel	18
II. The Measure of Damages Adopted by the Court of Claims is in Accordance with Well-Established Principles of Contract Law and is Appropriate Under the Circumstances of the Present Case	23

Page

A. Restitution is not limited to cases where damages are inadequate to compensate the plaintiff for the loss he has suffered as a result of the breach 24

B. Restitutionary relief is appropriate under the facts of this case 28

C. The measure of recovery adopted by the Court of Claims does not impair any federal policies 37

Conclusion 41

CITATIONS

CASES:

Andrews v. *O'Grady*, 252 N.Y.S. 2d 814, 44 Misc. 2d 28 39
Blair v. *United States*, 150 F.2d 676 (1945) 27
Boomer v. *Muir*, 24 Pac.2d 570 (Cal. App., 1933) 33
Burck v. *Taylor*, 152 U.S. 634 (1894) 18, 20
Burgess v. *Salmon*, 97 U.S. 381 (1878) 22
Bush v. *Canfield*, 2 Conn. 485 (1818) 25
Calder v. *Bull*, 3 Dall. 386 (1798) 22
Camellia Apartments, Inc. v. *United States*, 344 F.2d 667 (Ct. Cl., 1964) 32
Carrier Corp. v. *United States*, 328 F.2d 328 (Ct. Cl., 1964) 19
Connolly v. *Sullivan*, 173 Mass. 1, 53 N.E. 143 (1899) 33, 34
Crocker v. *United States*, 240 U.S. 74 (1915) 18
Fletcher v. *Peck*, 6 Cranch 87 (1810) 22
Goldwasser v. *United States*, 325 F.2d 722 (Ct. Cl., 1963) 37
Heitz v. *Sayers*, 32 Del. 207, 121 Atl. 225 (1923) 33
Hemminger v. *Western Assurance Co.*, 95 Mich. 355, 54 N.W. 949 (1893) 33
Johnston v. *Star Bucket Pump Co.*, 274 Mo. 414, 202 S.W. 1143 (1918) 33
Klein v. *United States*, 285 F.2d 778 (Ct. Cl., 1961) 37
Knapp v. *Gaston Teyssier*, 96 Pa. Super. 193 (1929) .. 33
L. Albert & Son v. *Armstrong Rubber Co.*, 178 F.2d 182 (C.A. 2, 1949) 26, 27, 29
Mammoth Oil Co. v. *United States*, 275 U.S. 13 (1927) 17

Page

Maryland Casualty Co. v. *Tulsa Industrial Loan & Investment Co.*, 83 F.2d 14 (C.A. 10, 1936) 19
Matter of Montgomery, 272 N.Y. 323, 6 N.E.2d 40 (1936) 33
Michael Del Balso, Inc. v. *Carozza*, 136 F.2d 280 (C.A. D.C., 1943) 23, 33
Miller v. *Ammon*, 145 U.S. 421 (1892) 18
Mooney v. *York Iron Co.*, 82 Mich. 263, 46 N.W. 376 (1890) 34
Muschany v. *United States*, 324 U.S. 49 (1945) 10, 17, 38
New York Mail & Newspaper Transportation Co. v. *United States*, 154 F. Supp. 271 (Ct. Cl., 1957), *certiorari* denied, 355 U.S. 904 (1957) 28, 39
Pan-American Petroleum Co. v. *United States*, 273 U.S. 456 (1926) 17
Pelletier v. *Masse*, 49 R.I. 408, 143 Atl. 609 (1928) ..23, 33
Perry v. *United States*, 294 U.S. 330 (1935) 38
Philadelphia v. *Tripple*, 230 Pa. 480, 79 Atl. 703 (1911) 33
Planche v. *Colburn*, 8 Bing. 14, 131 Eng. Rep. 305 (1831) 24
Rumley v. *United States*, 285 F. 2d 773 (Ct. Cl., 1961) 28
St. Paul-Mercury Indemnity Co. v. *United States*, 283 F.2d 918 (C.A. 10, 1956) 33
Schwasnick v. *Blandin*, 65 F.2d 354 (C.A. 2, 1937) 23, 25, 26, 27, 31, 34
Smith v. *Keith & Perry Coal Co.*, 36 Mo. App. 567 (1889) 25
Southern Painting Co. v. *United States ex rel. Silver*, 222 F.2d 431 (C.A. 10, 1955) 23, 33
Thompson & Son v. *Brown*, 106 Iowa 367, 76 N.W. 819 (1898) 34
Unexcelled Chemical Corp. v. *United States*, 137 Ct. Cl. 681, 149 F. Supp. 383 (1957) 21
United States v. *Barnard*, 255 F.2d 583 (C.A. 10, 1958), *certiorari* denied, 358 U.S. 919 (1958) 8, 10, 21
United States v. *Behan*, 110 U.S. 338 (1884) 26, 30, 31, 36, 40
United States v. *Brotherton*, 106 F.Supp. 353 (S.D. N.Y., 1952) 33
United States v. *Chemical Foundation*, 272 U.S. 1 (1926) 17
United States v. *Davio*, 136 F.Supp. 423 (1955) 22

Page

United States v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) 11, 13, 16, 17, 18, 19, 34
United States ex rel. Susi Contracting Co. v. *Zara Contracting Co.*, 146 F.2d 606 (C.A. 2, 1944) ..23, 25, 33
Valente v. *Weinberg*, 80 Conn. 734, 67 Atl. 369 (1907) 23, 33

STATUTES:

Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U.S.C. 51 .....2, 8, 10, 11, 12, 13, 15, 16, 18, 19, 20, 21, 22
Tucker Act, 28 U.S.C. 1491 .....12, 14, 23, 24, 31, 32, 37, 38
28 U.S.C. 1255(1) 2
U. S. Const., § 9, Cl. 3 22

MISCELLANEOUS:

5 Corbin, CONTRACTS (1951):

§§ 1102-21 23
§ 1104 24
§ 1107 35
§ 1112 .....33, 35
§ 1113 33

Dawson, "Restitution or Damages," 20 Ohio St. L. Jour. 175 (1959) 35

3 Fletcher, PRIVATE CORPORATIONS, (rev. ed. 1947):

§ 826 19

H.Rep. No. 212, 79th Cong., 1st Sess. (1945) 15, 20
H.Rep. No. 1880, 86th Cong., 2d Sess. (1960) 15, 20, 22

Keener, QUASI-CONTRACTS (1893):

§ 299 31

Palmer, "The Contract Price as a Limit on Restitution for Defendant's Breach," 20 Ohio St. L. Jour. 264 (1959) 33, 35

Page

Restatement, AGENCY 2d:
§ 391, comment "g" 16
Restatement, CONTRACTS:
§§ 347-357 23
§ 347, comment "b" 28
§ 347(1)(a), comment "c" 26, 33
§ 348, comment "a" 34
Williston, CONTRACTS (rev. ed. 1937):
§§ 1454-85 23
§ 1455 ..... 24, 25
§ 1459 35
§ 1475 34
§ 1479 35
§ 1480 26
§ 1485 33
Woodward, QUASI CONTRACTS (1913):
§ 260 31
§ 268 33

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 86

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY, *Respondent*

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Claims [R. 78] is reported at 347 F.2d 509. The findings of the Court of Claims [R. 123] are unreported. The opinion [R. 1] and findings of the Commissioner of the Court of Claims are unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on June 11, 1965 [R. 123]. A timely motion for reconsideration was denied on October 15, 1965 [R. 237]. By orders of the Chief Justice and Mr. Justice Brennan, entered on January 12, 1966, and February 9, 1966, the time for filing a petition for a writ of certiorari was extended to and including March 14, 1966 [R. 238-239]. The petition for a writ of certiorari was filed on that date and certiorari was granted on April 25, 1966 [R. 240, 384 U.S. 917]. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the discovery of violations of the Anti-Kickback Act between subcontractors and employees of a prime government contractor is, under the facts of this case and under applicable law, a valid ground for a forfeiture of the prime contract.

2. Whether, under the facts of this case and applicable legal precedent, the contractor is entitled to restitution for the reasonable expenses it incurred in performing the contract which was breached by the Government.

STATUTE INVOLVED

Section 1 of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U.S.C. 51, provides in relevant part:

> "The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, * * * (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract

entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; * * * is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor * * *. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by set-off of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor * * * in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor."

Section 4 of the Act provides:

"Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more that $10,000 or be imprisoned for not more than two years, or both."

STATEMENT

1. THE FACTS

A. The Contract and Its Cancellation

Until 1952, the business of respondent, Acme Process Equipment Company, consisted principally of the manufacture of equipment for the distillery, brewery, and sugar industries. In 1952, it became interested in obtaining government contracts in order to offset unevenness in its commercial business. At such time, respondent had no one on its payroll with background and experience in the field of government procurement [F. 2, R. 124].

On October 23, 1952, Acme submitted a bid to the Army Ordnance Corps for a contract for the manufacture of 75-mm. recoilless rifles. Acme's bid price was $337.31 per rifle (later corrected to $337.23). The four other bids submitted by competitive bidders were at unit prices of $484.05, $930.16, $423.00 and $684.00, respectively [F. 7, R. 126]. Acme was therefore the low bidder and on January 27, 1953, it was awarded a contract for 2,322[1] 75-mm. recoilless rifles at a unit price of $337.23 per rifle, subject to an upward price revision with a ceiling price of $369.20 per rifle [F. 7, 13, 51, 52, R. 126, 132, 205, 206]. In addition to the fact that Acme was low bidder, the Government was interested in developing an additional source of supply [F. 10, R. 108, 130-131]. The Army was at first concerned over Acme's ability to perform the contract but after investigating Acme's plant and personnel, the Government concluded that Acme and its subcontractors would be capable of carrying out the agreement [R. 108].

---

[1] This was later increased to 2,751.

The project was largely subcontracted, "leaving for Acme only the final finishing and assembly of components, and the earlier job of fashioning the rifle barrels from rough forgings with machines furnished by the Government under a separate facilities contract" [R. 79]. The largest subcontract was issued to All Metals Industries, Inc. for the production of the chambers and vent assemblies at unit prices of $71.29 (target) and $81.64 (ceiling) for the chambers, and $51.66 (target) and $58.93 (ceiling) for the vent assemblies [F. 19, R. 140].

The contract proved unprofitable for Acme not only because of Acme's inexperience [F. 41, R. 187-188], but also because of delivery failures of subcontractors [F. 42, R. 188-199] and because of defective machinery furnished by the Government under the facilities contract [F. 34-40, 43, R. 153-187, 193]. Its cost of production on initial deliveries through December 31, 1953, was $1,179.29 per rifle [F. 52(a), R. 206]. However, by June 30, 1954, the cost per rifle had been reduced to $690.21 [F. 52(c), R. 207-208]. Although extensions in delivery schedules excused some delays in deliveries, Acme fell behind in others and liquidated damages were assessed [F. 14, 46, R. 133, 199-200]. By the end of July 1954, 1,163 rifles had been delivered [F. 14, R. 133] at an average cost of $877.77 per rifle.[2]

After the discovery of "alleged violations of statutes relating to kickbacks, contingent fees, and conflicts of interests" [R. 79], the Army, on July 22, 1954, suspended work under the contract and on August 18, 1954, after Acme had delivered 1,163 rifles, the Army

[2] This figure is based on the average costs of $1,179.29 for the first 446 and $690.21 for the remaining 717 rifles actually delivered [R. 110].

Ordnance Corps notified Acme that its contract was cancelled for unspecified "statutory violations" [F. 47, 49, R. 201, 202-203]. The circumstances surrounding the cancellation of Acme's contract are fully set forth in the findings of fact of the Court of Claims [F. 47-50, 54-55, R. 201-205, 212-223].

B. The Kickbacks

In October 1952, Acme hired Harry K. Tucker, Jr. and James Norris to manage a separate division to be set up by Acme to handle government contracts in the metals field. Norris was made general manager of production with authority to submit bids, sign government contracts, and award subcontracts; Tucker was put in charge of sales, government contracts, and expediting and coordinating subcontracts [F. 3, 16, R. 124, 138].

Prior to the award of the prime contract and unbeknown to Acme, Tucker had entered into a contract with All Metals Industries, Inc., under which he was to receive a commission on sales procured by him for that company. After the award of the prime contract to Acme, Tucker secured for All Metals a subcontract from Acme to manufacture chambers and vent assemblies for the 75-mm. recoilless rifles [F. 18, 19, R. 139-141].

Subsequent to the award of All Metals' subcontract, Tucker and Jack Epstein (then superintendent of Acme's plant in Oreland, Pennsylvania, and son of its president Joshua Epstein) threatened to cancel All Metals' subcontract unless the subcontractor paid $25,000 to Jack Epstein. As an alternative, an arrangement was made whereby All Metals agreed to pay

$23,500 to a dummy corporation owned by Tucker, Norris, and Jack Epstein, for consulting engineering services. To cover the amount extorted from All Metals, the subcontractor increased its unit price to Acme for vent assemblies by $10.00. A total of $12,000 was paid by All Metals to Gunn Engineering Company, the dummy corporation referred to above, for services which were never rendered [F. 20, R. 141-142]. Acme had no information until the late summer and fall of 1953 which would lead it to suspect that Tucker, Norris and Jack Epstein had made illegal arrangements or that it was being victimized by them, and it was not until around the time of the cancellation of Acme's contract in August 1954 that it obtained specific knowledge of the illegal arrangments [F. 20, 30, R. 141-142, 149].

In addition to the secret arrangements which Tucker had with All Metals, similar arrangements were made by Tucker with two other companies, both of which were subsequently awarded subcontracts by Acme. None of the officials of Acme (with the exception of Tucker, Norris and Jack Epstein) were aware of these arrangements until after the cancellation of Acme's prime contract [F. 22, 23, R. 144-146]. A fourth company was awarded subcontracts by Acme after having hired Tucker's father partially on a commission basis, and another company received a subcontract from Acme after having entered into a clandestine agreement to pay commissions to Philip Chagnon on business obtained by him. Chagnon had been previously hired by Norris as his assistant in Acme's plant. None of Acme's responsible officials were aware of the secret arrangement involving Tucker's father or Chagnon [F. 24, 25, R. 146-147].

Norris was discharged by Acme in September 1953, after it was discovered that he had charged expenses incurred in connection with work on his farm against Acme's prime contract [F. 26, R. 147]. By the end of November 1953, the employment of both Tucker and Chagnon had been terminated [F. 27, 28, R. 148]. On August 28, 1954, Jack Epstein resigned from Acme [F. 29, R. 148].

Tucker, Norris and Jack Epstein were subsequently indicted for violation of the Anti-Kickback Act, 60 Stat. 37 [F. 31, R. 149]. After presentation of the Government's case, the defendants' motion for acquittal was granted on the ground that the Act at that time did not apply to a fixed price contract with a provision for price redetermination subject to a ceiling price [F. 31, 54(j), R. 149-150, 219-220].[3] The District Court remarked that

> "It may well be that Congress thought that in this type of contract, the employer would be the one that would protect the interests of the United States, but no employer can protect himself against treacherous employees who are determined to commit morally reprehensible acts and who for the sake of a few paltry dollars, set up the type of vicious scheme that has been set up in this case, which resulted in increased cost both to the employer and to the United States." [F. 31, R. 150].

---

[3] The District Court's decision is not contrary to the decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Barnard*, 255 F.2d 583 (C.A. 10, 1958), *certiorari* denied, 358 U.S. 919 (1958), for the reason that in *Barnard* the contract had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward."

The District Court further said that "This case clearly showed that the employer was victimized, and I would say indirectly the United States was also, but the defendants were narrowly within the law." [F. 31, R. 150]. As a result of the District Court's decision, amendatory legislation was recommended (H. Rep. No. 1880, S. Rep. No. 1585, 86th Cong., 2d Sess., 1960) and the Act was amended in 1960 to apply to all negotiated contracts (74 Stat. 740, 41 U.S.C. 51).

2. PROCEEDINGS BELOW

On July 26, 1957, after nearly three years of fruitless but almost successful efforts by Acme to obtain an administrative settlement, Acme filed this action in the Court of Claims in which it sought restitution of its unreimbursed costs of performance or, as an alternative, damages for breach of contract [F. 54, 55, R. 212-223]. Settlement was blocked only by the intransigence of the Army Ordnance Corps which "through its General Counsel was unswerving in its views that cancellation of the contract was legally justified, despite some discouraging responses from other agencies of the Government which had reviewed the matter." [F. 54(k), R. 220].

The Government's major defense to Acme's suit in the Court of Claims was that Acme was entitled to no recovery because it violated certain statutes and covenants (concerning contingent fees, kickbacks, false claims, and conflicts of interests). After a full trial before a commissioner, the Court of Claims, in a lengthy opinion issued June 11, 1965, unanimously rejected all of the Government's defenses and found that the cancellation of Acme's prime contract was unjustified and the Government had breached the contract when it cancelled [R. 78-123].

Insofar as the Government's contention that it was entitled to cancel the contract for violations of the Anti-Kickback Act was concerned, the Court of Claims first expressed the opinion that "it is highly doubtful that there was any pre-existing right of the Government to cancel the entire contract of a prime contractor, whose agents received improper kickbacks of which he was unaware." The court then went on to state that since Congress, in enacting the 1946 Act, gave the Government only one civil remedy—recovery of the kickbacks—the Government had no right to annul the contract [R. 91-92].

The court below also expressed grave doubts as to whether the 1946 Act was applicable to the contract in question. Citing *Muschany* v. *United States,* 324 U.S. 49, 66-67 (1945), the court said that if the 1946 Act was inapplicable, the improper actions could hardly have contravened any recognized federal public policy. Of particular importance, the court said that

> "When Acme's agents received kickbacks about which plaintiff had no knowledge, it can scarcely be said that plaintiff (as distinguished from the agents) violated 'obvious ethical or moral standards,' and that its contract with the defendant could therefore be cancelled on that ground." [R. 92-93].

The decision of the Court of Appeals for the Tenth Circuit in *United States* v. *Barnard,* 225 F.2d 583 (C.A. 10, 1958), *certiorari* denied, 358 U.S. 919 (1958), was said by the court below to be distinguishable because the contract in *Barnard* had "no limitation * * * upon the range of redetermination or revision of prices, upward or downward" as opposed to Acme's contract which contained a ceiling price [R. 93].

The Government's contention that the case was governed by the *Dixon-Yates* case [*United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961)], was rejected by the Court of Claims. The court first pointed out that the statutory provision violated in *Dixon-Yates* was clearly on the books at the time of the misconduct while the court found it "highly questionable" whether the 1946 Anti-Kickback Act applied to Acme's contract. The Court of Claims then went on to say that the cases were different because the statute in *Dixon-Yates* provided for no more than a criminal sanction, whereas Congress in the Anti-Kickback Act specifically provided for a civil remedy. Most significantly, the Court of Claims said that the violation in *Dixon-Yates* affected the validity of the entire transaction since it related to the negotiation and award of the contract to a not-altogether-innocent contractor. On the other hand, in the instant case, the kickbacks were not related to the negotiation and execution of Acme's contract with the Government but were separate transactions involving the subcontractors and were made after the award of the contract to Acme by the Government without Acme's knowledge, actual or implied [R. 93-94]. The court below also noted that the wrongdoings of Tucker and his co-conspirators could not be imputed to Acme since Acme "was being swindled by its own agents" [R. 88, fn. 12].

With reference to the appropriate measure of damages to be awarded Acme for the Government's breach of contract, the Court of Claims held that Acme was entitled to restitutionary relief for the Government's breach of its express contract. In so holding, the court acknowledged the fact that restitution has long

been recognized as merely an alternative remedy for a breach of contract by the commentators and by both the federal and state courts. Since contracts with the Government have been held to be governed by the same principles as "those between man and man" the court below said that it was, consequently, obliged to award restitution to Acme unless this form of recovery was precluded by the Tucker Act, 28 U.S.C. 1491. Acme's claim for restitution was held by the court below to be within the ambit of the Tucker Act because such claim was founded upon an express contract within the meaning of that Act [R. 105-109].

Having established Acme's entitlement to restitution, the court went on to hold that recovery was not limited to the value of the goods actually received by the Government but could be based on the reasonable value of Acme's entire performance. The reasonable value of Acme's performance, said the Court of Claims, is most accurately reflected by the actual costs it incurred in performing its contract unless the Government can establish that such costs were excessive [R. 109-111].

The court also held that Acme's recovery must be reduced by any kickbacks it latently paid through payments to its subcontractors so that the Government will receive the full statutory relief available to it under the Anti-Kickback Act [R. 110-111].

SUMMARY OF ARGUMENT

The government has challenged the rulings of the Court of Claims that (1) the Government was not entitled to cancel the contract for violation of the Anti-Kickback Act by certain of Acme's employees and hence was guilty of a breach of contract, and (2) that

Acme was entitled by way of remedy therefor to restitution of the reasonable costs it had expended in performing the contract. It is the respondent's position that the decision of the Court of Claims on both of these two aspects of this case is correct and is fully supported by the facts of this case and applicable legal precedent.

I.

Acme's contract with the Government was not made in violation of any statutory prohibition nor did it result from an illegal transaction. Consequently, the test of the *Dixon-Yates* case has not been met and the Government's reliance upon that case is misplaced.

The primary purpose of the original Anti-Kickback Act was to insure that the Government would have a right to recover the amount of any illegal kickback payments. Otherwise, the Government would ultimately bear the cost of the kickbacks. To further discourage kickbacks in government contracts, a criminal penalty for violation of the Act was added by Congress. The Government had no pre-existing right at the time of the enactment of the Act to cancel a prime contract because of kickback payments by subcontractors and Congress created no such remedy in enacting the Anti-Kickback Act, but, on the contrary, Congress, by providing for a specific civil remedy, precluded any such remedy as contract annulment.

The remedies provided for in the Anti-Kickback Act are adequate to relieve the Government of the cost of any illegal kickbacks and thus insure that the policy enunciated in the Act will be carried out.

II.

The award of restitutionary relief by the Court of Claims is in accordance with well-established principles of contract law and is appropriate under the facts of this case. Restitution is not limited to cases where conventional damages are inadequate; nor is it limited to cases involving breaches of profitable contracts, but it is applicable to cases involving losing contracts as well. Restitution, as an alternative remedy for breach of contract, is available where, as in the present case, there is a total breach of contract.

The measure of relief decreed by the Court of Claims is not punitive, but is compensatory. Such a measure of relief merely compensates Acme for the reasonable costs it incurred in reliance upon the Government's implied promise that it would do nothing to prevent performance of the entire contract by Acme. The Government, as the contract-breaker, should not be allowed to say that Acme was not damaged to the extent of the reasonable costs Acme expended in performing the contract.

Neither the fact that the contract could have been terminated for the convenience of the Government nor the fact that it is the policy of the Government to award procurement contracts only on a fixed price basis, has any bearing upon the question of the measure of recovery when the Government breaches a contract. Restitution is permissible in suits under the Tucker Act and it does not contravene any federal procurement policies.

ARGUMENT

I.

WHERE EMPLOYEES OF A PRIME GOVERNMENT CONTRACTOR RECEIVE KICKBACKS FROM A SUBCONTRACTOR, WITHOUT THE KNOWLEDGE OF THE PRIME CONTRACTOR, IN VIOLATION OF THE ANTI-KICKBACK ACT, THE GOVERNMENT HAS NO RIGHT TO CANCEL.

A. The Right to Cancel a Contract Because of a Statutory Violation Can Be Implied Only Where the Contract Was Made or Procured in Violation of the Statutory Prohibition.

The legislative history of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U.S.C. 51, clearly indicates that the purpose of that Act was to insure that the Government would have the right to recover the amount of any kickbacks which might be discovered. H.Rep. No. 212, 79th Cong., 1st Sess., pp. 4-6 (1945); H.Rep. No. 1880, 86th Cong., 2d Sess. (1960). The House Report on the 1946 Act states: "There is no existing statutory or other authority of law under which it may be said that the United States clearly has a right to recover the amounts of any such fees or gratuities." H.Rep. No. 212, 79th Cong., 1st Sess. p. 2 (1945).[4] It is extremely doubtful that the Government had or has any right at common law to sue to recover the amount of the kickbacks. More importantly, no authority was presented to the Court of Claims, nor has any been presented to this Court, which indicates, or even hints, that the Government had or

---

[4] It is also interesting to note that when the Comptroller General sent his recommendation to the Congress that the Anti-Kickback Act be amended to apply to all types of negotiated contracts, he noted that before the Act was enacted in 1946, "there was no specific statutory remedy for recovery by the Government of the amount of the kickback, and there was serious doubt as to the adequacy of common law remedies." H. Rep. No. 1880, 86th Cong., 2d Sess. (1960).

has a common law right to cancel the entire contract of a prime contractor, whose employees have received improper kickbacks of which the prime contractor was not aware, and by which such "treacherous employees" the prime contractor was thereby "victimized." Acme may have had a right at common law to cancel its agreements with the subcontractors after discovering the secret kickback arrangements but this does not mean that the Government, which had no privity of contract with the subcontractors, had any such right to cancel its prime contract with Acme. See Restatement, AGENCY 2d, § 391, Comment "g". Nevertheless, the Government contends that such a right may be implied from the Anti-Kickback Act—a sort of "bootstrap" argument which reads into a statute language, which does not exist, by applying a common law principle, which also does not exist.

The right to cancel a contract because of a statutory violation can be properly implied only where the contract is made or procured in violation of the statutory prohibition. This principle was clearly recognized by this Court in *United States* v. *Mississippi Valley Generating Co., supra* (the *Dixon-Yates* case), upon which the Government heavily relies. The contract in that case "resulted from an illegal transaction," i.e., negotiations in which the Government's representative had at the same time been an officer of a company which expected to benefit from the contract. 364 U.S. at 546. The Court said that such a contract is not to be enforced "when it arises out of" circumstances that would lead enforcement to offend the essential purpose of the statute. 364 U.S. at 563. The purpose of nonenforcement was said to be the protection of the public from the corruption which might be undetectable be-

neath the surface of "a contract conceived in a tainted transaction." 364 U.S. at 565. The inherent difficulty in detecting corruption was said to require that "contracts made in violation of Section 434" be held unenforceable. 364 U.S. at 565.

It is not enough under the test of *Dixon-Yates* that there be a violation of a statute. The contract itself must be made or conceived in violation of the statute. Where the formation of the contract does not result from an illegal transaction or statutory violation the Government has no right to cancel. 364 U.S. at 564. See also *United States* v. *Chemical Foundation,* 272 U.S. 1 (1926); *Muschany* v. *United States,* 324 U.S. 49 (1944). That the contract must emanate from an illegal transaction in order to be rendered unenforceable was clearly pointed out by this Court in distinguishing the *Muschany* case, upon which the Court of Claims relied in *Dixon-Yates*, and also in the instant case:

> "* * * unlike this case, *Muschany* did not involve a contract which resulted from an illegal transaction, and it is consequently understandable that the contract there in question was enforced." 364 U.S. at 564.

As in the *Dixon-Yates* case, other decisions of this Court have recognized that the right of cancellation is appropriate only where the contract resulted from an illegal transaction. For instance, *Mammoth Oil Co.* v. *United States,* 275 U.S. 13 (1927), involved an oil lease "fraudulently made to circumvent the law and to defeat public policy." 275 U.S. at 55. Likewise, the contracts and leases in *Pan-American Petroleum Co.* v. *United States,* 273 U.S. 456 (1926), were

"consummated by conspiracy, corruption and fraud." 273 U.S. at 509. *Crocker* v. *United States,* 240 U.S. 74 (1915), involved a contract which resulted from an illegal arrangement with a government employee. *Burck* v. *Taylor,* 152 U.S. 634 (1894), involved a contract "made in contravention of a statute." *Miller* v. *Ammon,* 145 U.S. 421 (1892), discusses the general rule of law that "a contract made in violation of a statute is void."

The Government has thus misconceived the test of the *Dixon-Yates* case. It leaves out an essential element: the contract must have been made in violation of a statute. Hence, the test is more properly stated as follows: the Government may, without fault, cancel a procurement contract *made in violation of a statute* if such a step is necessary to effectuate the policies of the statute that has been violated. Respondent submits that this test has not been met in the present case.

B. The Test of the Dixon-Yates Case Has Not Been Met Here Since Acme's Prime Contract Was Not Made in Violation of the Anti-Kickback Act; in Any Event, the Anti-Kickback Act Gave the Government No Right to Cancel.

1. The Court of Claims found in Acme's case that "the kickbacks * * * were in no way related to the negotiation and execution of Contract 1213, and do not affect its validity. They were separate transactions made without the knowledge of plaintiff which certainly had nothing to gain by these secret dealings." [R. 94]. On the contrary, in *Dixon-Yates* the contract was made in violation of the statutory prohibition." 364 U.S. at 563, 564. In addition, the plaintiff in *Dixon-Yates* was fully aware that the Government was represented by a consultant who was, at the same time, associated with an investment banking company which

stood to profit if plaintiff was awarded the contract. Thus, the principle of *Dixon-Yates* does not require or direct that Acme's prime contract be cancelled.[5]

The Anti-Kickback Act prohibits the "payment" of fees or commissions to agents of a prime contractor as an inducement for the award of a subcontract. 41 U.S.C. 51. There could be no violation of the statute until after the award of Acme's prime contract for if any such prohibited payments were made they were not made until after the award. All Metals' subcontract conceivably may have been made in contravention of the statute but it cannot be said that Acme's prime contract, made without knowledge of the secret arrangements of its subcontractors, was made in violation of the statute for, if the statute was violated, it was not so violated until after the award of Acme's contract.

Respondent agrees with the Government that the public should be protected against the sort of kickback arrangements which existed in this case. However,

---

[5] Respondent believes *Dixon-Yates* is also clearly distinguishable from the present case for other reasons. *Dixon-Yates* did not involve a situation like that of Acme where a prime contractor's employees were also agents of a subcontractor. Instead, *Dixon-Yates* involved a situation where a Government employee was also an agent of a company which stood to benefit from the award of the prime contract. Congress provided no civil remedy for a violation of the statute involved in *Dixon-Yates*, whereas it provided a specific civil remedy for a violation of the statute involved in the present case. It is also significant that in *Dixon-Yates* the wrongdoings of the contractor's employees were imputable to the contractor. See *Carrier Corp.* v. *United States*, 328 F.2d 328 (Ct. Cl., 1964). On the other hand, since Acme was "swindled by its own agents" and had nothing to gain from their actions, it cannot be charged with the violations of the Act committed by its employees. 3 Fletcher, PRIVATE CORPORATIONS, § 826 (rev. ed. 1947); *Maryland Casualty Co.* v. *Tulsa Industrial Loan & Investment Co.*, 83 F.2d 14 (C.A. 10, 1936).

issue is taken with the Government's contention that contract cancellation is either necessary or permissible here.

2. Not every contract in contravention of the terms of a statute is unenforceable. The courts must search the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. *Burck* v. *Taylor, supra.*

The primary purpose of the Anti-Kickback Act was to provide a secure legal basis for recovering kickback payments discovered on audit so that the Government would not ultimately bear the costs of the kickbacks. H.Rep. No. 212, 79th Cong., 1st Sess., pp. 4-6 (1945); H.Rep. No. 1880, 86th Cong., 2d Sess. (1960). The Anti-Kickback Act provides a specific civil remedy for its violation, i.e., recovery of the kickbacks. Respondent submits that the civil remedy provided for by the Act, together with the criminal penalty imposed by the Act, are adequate to effectuate the basic purpose of the Act[6] and it was never the intention of Congress to create by implication the remedy of contract cancellation. On the contrary, by giving the Government only one civil remedy against contractors whose agents or employees had received secret kickbacks unknown to the contractor, Congress thereby precluded the addi-

[6] In a letter to the Speaker of the House of Representatives, which accompanies the committee reports on the 1960 amendment to the Act, the Comptroller General said: "We are satisfied that enactment of the Anti-Kickback Act of 1946 has had a salutary and strong deterrent effect against commercial bribery and the payment of kickbacks under the cost reimburseable type contracts which the statute was designed to cover." H. Rep. No. 1880, 86th Cong., 2d Sess. (1960). The Government's contention that contract cancellation is necessary to carry out the policies of the Act is therefore contradictory.

tional remedy of contract annulment. The Court of Claims in so holding applied a well-established rule of statutory construction—*inclusio unius est exclusio alterius.*

It is not the function of the judiciary to create civil remedies which Congress did not have in mind at the time of an enactment. *Unexcelled Chemical Corporation* v. *United States,* 149 F.Supp. 383 (Ct. Cl., 1957). The Court of Claims properly ruled that although the duplicity of Acme's employees may have given Acme a right to cancel its subcontracts, Congress did not intend to give the Government a right to cancel the prime contract under such circumstances.

While the kickbacks could have resulted in increased costs to the Government as well as to Acme unless some action were taken, the Court of Claims' decision requires Acme's recovery to be reduced by the amount of any kickbacks latently included in payments to its subcontractors. Therefore, the kickbacks will not cost the Government a single cent. The policy expressed by Congress in the Anti-Kickback Act will therefore be fully abided by.

3. The Court of Claims, in addition to the other reasons given for holding that the Anti-Kickback Act gave the Government no right to cancel Acme's contract, expressed great doubt as to the applicability of the Anti-Kickback Act, as enacted in 1946, to Acme's contract. The Court distinguished *United States* v. *Barnard, supra,* for the reason that the contract involved in *Barnard* was a price redetermination contract with no ceiling price whereas the price redetermination feature of Acme's contract was subject to a ceiling price. The *Barnard* case did not resolve the

question as to whether the 1946 Act applied to the type of contract involved in the instant case. This fact is clearly evident from the legislative history of the 1960 amendment. H.Rep. No. 1880, 86th Cong., 2d Sess. (1960). Although the 1960 amendment clearly covers the type of contract involved in the present case and is retroactive, respondent believes that to apply the 1960 amendment retroactively to work a forfeiture of Acme's contract (which was the very contract which precipitated the 1960 amendment) would be manifestly unfair and inequitable and would violate the prohibition contained in the Constitution against the enactment of *ex post facto* laws.

Although the retrospective application of Section 1 of the 1960 Anti-Kickback Act to enable the Government to sue to recover the kickbacks does not offend the Constitution [*United States* v. *Davio,* 136 F.Supp. 423 (1955)], Section 4 of the Act, which imposes criminal penalties, could not have been applied retroactively to punish the individuals receiving the kickbacks. *Fletcher* v. *Peck,* 6 Cranch 87 (1810); *Calder* v. *Bull,* 3 Dall. 386 (1798). Nevertheless, the Government urges this Court to retroactively apply the statute to work a total forfeiture of Acme's contract because of kickback violations which were not punishable as crimes when committed. Respondent submits that such a result would be repugnant to the basic concepts of the Constitutional prohibition against *ex post facto* laws. U. S. Const., § 9, Cl. 3; *Burgess* v. *Salmon,* 97 U.S. 381 (1878); *Fletcher* v. *Peck, supra.*

For all of the reasons set forth above, respondent believes that the Court of Claims was correct in holding that the cancellation of Acme's contract was unjustified and was therefore a breach of contract by the Government.

II.

THE MEASURE OF DAMAGES ADOPTED BY THE COURT OF CLAIMS IS IN ACCORDANCE WITH WELL-ESTABLISHED PRINCIPLES OF CONTRACT LAW AND IS APPROPRIATE UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Restitution has long been recognized by legal scholars and by the federal and state courts of this country as an alternative remedy for breach of contract.[7]

The other two recognized remedies for breach of contract are specific performance and damages. However, since the Court of Claims may only award monetary judgments under the Tucker Act, 28 U.S.C. 1491, no question of specific performance is involved in this case and we thus are concerned with only the remedies of damages and restitution.

The remedy of damages is designed to put a party in the position he would be if the contract had been fully performed, i.e., his post-contract position, whereas restitution is designed to restore the innocent party to his *status quo ante,* i.e., his pre-contract position. Restatement, CONTRACTS, §§ 326, 347 (1932).

Respondent believes that the Court of Claims' allowance of restitutional relief in this case was not only consistent with well-established principles of contract law but that it was appropriate under the cir-

---

[7] Restatement, CONTRACTS, §§ 347-357; 5 Corbin, CONTRACTS, §§ 1102-21 (1951); Williston, CONTRACTS, §§ 1454-85 (rev. ed. 1937). See also, *Schwasnick* v. *Blandin,* 65 F.2d 354, 357 (C.A. 2, 1937); *Michael Del Balso, Inc.* v. *Carozza,* 136 F.2d 280 (C.A. D.C., 1943); *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.,* 146 F.2d 606, 610 (C.A. 2, 1944); *Southern Painting Co.* v. *United States ex rel. Silver,* 222 F.2d 431 (C.A. 10, 1955); *Valente* v. *Weinberg,* 80 Conn. 134, 67 Atl. 369 (1907); *Pelletier* v. *Masse,* 49 R. I. 408, 143 Atl. 609 (1928).

cumstances of this case. Respondent also believes that the Court of Claims' decision does not contravene any federal procurement policies.

A. Restitution Is Not Limited to Cases Where Damages Are Inadequate to Compensate the Plaintiff for the Loss He Has Suffered as a Result of the Breach.

The Government does not now contend, as it did in the court below, that restitution is never available as a contract remedy in suits under the Tucker Act, 28 U.S.C. 1491. Now the Government contends that restitution is not available where the "traditional" remedy of damages is adequate to compensate a party for the loss resulting from the termination of his contract and where restitution would place such party in a better position than he would have attained had the contract been completed.

Respondent submits, however, that the Government's contention is completely contrary to the well-established rule in this country to the effect that the only limitation on the availability of restitution as an alternative remedy for breach of contract is that there be a material or a total breach of contract. See Corbin, CONTRACTS, § 1104 (1951); Williston, CONTRACTS, § 1455 (rev. ed. 1937).

1. Restitution as a remedy for breach of contract was recognized in England as early as 1831. *Planche* v. *Colburn,* 8 Bing. 14, 131 Eng. Rep. 305 (1831). There the defendant had engaged the plaintiff to write a book for publication in a "juvenile library" series. After the plaintiff had spent time in preparation of the book but before he had completed a manuscript the defendant abandoned the project. Although the defendant never received a manuscript or any part of

one, it was held that the plaintiff could recover the value of his work in an action on the common counts. Restitution was given, in short, for the value of "the performance for which the defendant bargained." Although there are still many exceptions and inconsistencies in the application of the rule in England, the American courts have adopted a more liberal view. See Williston, CONTRACTS, § 1455 (rev. ed. 1937).

A leading case in this country on the concept of restitution is *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co.*, 146 F.2d 606 (C.A. 2, 1944). The court there said that the right of a promisee to "forego any suit on the contract and claim only the reasonable value of his performance" was an accepted principle of contract law "save for an occasional case viewed as illogical by the text writers, who are solidly in support of the doctrine." 146 F.2d at 610.

The *Zara* case involved a construction contract but the opinion in that case nowhere suggests that restitution is limited to that type of case.

Restitution has never been limited to employment and construction contracts as the Government suggests. It has also been applied, for example, to contracts for the sale or purchase of goods as well. See, e.g., *Smith* v. *Keith & Perry Coal Co.*, 36 Mo. App. 567 (1889); *Bush* v. *Canfield*, 2 Conn. 485 (1818).

Judge Learned Hand recognized the availability of restitution as a remedy for a breach of contract in *Schwasnick* v. *Blandin*, 65 F.2d 354 (C.A. 2, 1937), where he said that "if the promisee has performed so far as he has gone, and the promisor breaks his promise, the promisee may abandon the contract and sue

for restitution, in which he can recover the reasonable value of his services, measured by what he could have got for them in the market, and not by their benefit to the promisor. * * * it is the breach," said Judge Hand, "which gives him the power to call off the contract and raises the obligation to restore him to the status quo ante." 65 F.2d at 357.

As authority in the *Schwasnick* case, Judge Hand cites the Restatement, CONTRACTS, § 347(1)(a), comment "c"; Williston, CONTRACTS, § 1480, and the decision of this Court in the often-cited case of *United States* v. *Behan,* 110 U.S. 338 (1884). This Court's opinion in the *Behan* case, a case involving a contract with the Government for certain improvements to the harbor at New Orleans, clearly supports an award of restitutionary relief in the present case. Mr. Justice Bradley, in his opinion in that case, said:

> "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit.* There is then no question of losses or profits." 110 U.S. at 345.

There is a line of cases beginning with *L. Albert & Son* v. *Armstrong Rubber Co.,* 178 F.2d 182 (C.A. 2, 1949), which holds that in a suit for damages for breach of contract the "promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost if the contract had been performed." 178 F.2d at 189. This doctrine does not apply, however, to the situa-

tion where the promisee seeks restitution for the value of his services in actually performing the contract. *Schwasnick* v. *Blandin, supra.* The outlay for which recovery was sought in the *Armstrong Rubber* case, for example, was the cost incurred by a buyer of machinery in constructing a foundation upon which to place machines designed to recondition old rubber. Performance of the contract in that case by the buyer did not consist of the construction of the foundation but performance consisted of the acceptance of the machinery and payment of the purchase price therefor. In Acme's case, however, the manufacture of recoilless rifles was part of the actual performance bargained for by the Government since Acme's contract was not merely for the sale of a finished product but was for the manufacture and delivery of such product. Acme's costs were incurred in actually performing the contract—not in preparation for performance.

2. It is true that in a suit to recover common law damages a party is not entitled to be placed in a better position than he would have been in had the contract been completed. *Blair* v. *United States,* 150 F.2d 676, 678 (1945). But this doctrine has no application where a party seeks restitution. In seeking damages for breach of contract, the plaintiff is asking that he be placed in as good a position as he would have been in had the contract been completed. It is thus perfectly logical that a plaintiff should not be placed in a better position than he would have been in had the contract been completed. However, in granting restitution as a remedy for breach of contract, "the purpose to be attained is the restoration of the injured party to as good a position as that occupied by him

before the contract was made." Restatement, CONTRACTS, § 347, comment "b". Hence, where restitution is sought, the position in which the plaintiff would have been had the contract been completed is immaterial.

The concept of restoring a party to the *status quo ante* upon rescission of a contract by the Government was recognized by the Court of Claims in *New York Mail & Newspaper Transportation Co. v. United States,* 154 F.Supp. 271 (Ct. Cl., 1957), *certiorari* denied, 355 U.S. 904 (1957), where the court said: "When an individual or the Government rescinds a contract, the parties are to be placed as far as possible in the position they would have occupied without the transaction." The same position was taken in *Rumley v. United States,* 285 F.2d 773 (Ct. Cl., 1961), where it was said: "Rescission contemplates a return by the parties to the status quo."

The Government thus misconceives the underlying theory of restitution. Even so, the alternative remedy of damages would fall far short of adequately compensating Acme for its loss in this case.

B. Restitutionary Relief Is Appropriate Under the Facts of This Case.

The Government argues that Acme would have lost large sums of money if it had been allowed to complete the contract and therefore to award restitution would result in a windfall to Acme. As discussed previously, since Acme elected to forego a suit for damages and seek restitution for the value of its performance, whether Acme would have lost money on the contract or not is unimportant. Nevertheless, no one knows exactly what amount Acme would have lost had

it been permitted to complete.[8] In the case of the manufacture of any new product, initial costs normally are high but as production continues a relatively high level of efficiency is reached at which time costs are averaged out. Until such time as a high level of efficiency has been reached, there is no accurate way to estimate completion costs and such costs must therefore, of necessity, be deemed speculative.

In Acme's case, initial costs were high not only due to Acme's inexperience and to the inexperience of its subcontractors, but also due to the fact that the Government furnished it with defective machinery under the facilities contract, which fact was responsible for one-third of the "delay factors in terms of time or cost" incurred by Acme [F. 43, R. 191-193]. This significant fact is conveniently overlooked by the Government on brief.

The speculation in this case on the amount of Acme's loss (a significant part of which was caused by the Government itself, as indicated above) arises solely as a result of the Government's breach of contract. Had there been no breach of contract there would have been no necessity to so speculate. For the same reason

---

[8] Although the Commissioner of the Court of Claims found that Acme would have lost $550,409 if it had been allowed to complete the contract [F. 69, R.75], exception was taken to such finding upon the ground that the amount of Acme's prospective loss was not established by the record and the Court of Claims made no finding as to the amount Acme would have lost. If such prospective loss is relevant the burden of proving the amount of such loss was clearly on the government. *L. Albert & Son* v. *Armstrong Rubber Co., supra.* Although the issue of whether the Government proved the amount Acme would have lost if the contract had been completed is not before this Court, respondent believes the amount of such loss has not been established.

that prospective profits may not be recovered where not proved or where they are speculative, prospective losses which might have been incurred had the party not been prevented from completing his contract may not be charged against the costs incurred by the innocent party in performing the contract. *United States* v. *Behan, supra.* To deny restitutional relief in the present case would result in charging Acme with such prospective losses, thus denying to Acme whatever benefit it might have been able to obtain by a reduction of costs through increased efficiency for the balance of its performance.

It is also important to note that the benefit which the Government bargained for in this case was not merely the manufacture and delivery of the recoilless rifles called for under this one contract. One of the benefits contemplated by the Government in awarding the contract to Acme was that "placing this procurement [in] subject contractor's plant will not only broaden the manufacturing base but create a salutary effect, pricewise, on all other procurements of this type." [R. 108]. Likewise, the benefit to Acme was not limited to the price to be received under this one contract. If the Government had not repudiated this contract, Acme would undoubtedly have had an opportunity to recoup any loss it might have incurred on this contract in future contracts as efficiency increased and the heavy initial costs incurred under this contract were averaged out. But the Government repudiated its contract, thereby depriving Acme of any chance whatsoever of ever realizing such benefit.

The Government's argument that Acme's costs were not caused by the Government's breach serves no basis

upon which to deny restitutional relief for the simple reason that "The party who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred." *United States* v. *Behan,* 110 U.S. at 85. Furthermore, the concept of restitution as recognized by the Court of Claims would deny to Acme recovery of any costs which are shown to be excessive as a result, for example, of inefficiency or extravagance [R. 109]. Not only is the Government's argument therefore meritless on this point but it is also premature for the Court of Claims has decreed that the Government shall have an opportunity to show that Acme's costs were excessive.

1. Respondent believes there is no question that it had a right to disregard the terms of the contract upon the Government's breach—"that is, to quit performance on [its] own side and relinquish [its] right to compensatory damages measured by reference to the terms of the contract"—and demand restitution for the value of its performance. Woodward, QUASI-CONTRACTS, § 260 (1913). See also, Keener, QUASI-CONTRACTS, § 299 (1893).[9]

There is no more merit to the Government's argument that the Tucker Act does not permit a contractor

---

[9] This view of the nature of the restitutionary remedy was also well expressed by Judge Hand in *Schwasnick* v. *Blandin, supra.* When the promisor has broken his promise, Judge Hand said, and the plaintiff seeks restitution, "he sues upon that wrong. True, he does not seek the equivalent in money of what was promised; but it is the breach which gives him the power to call off the contract and raises the obligation to restore him to the status quo ante." 65 F.2d at 357.

to ignore the contract price and sue for restitution than there would be to the argument that a contractor cannot sue for common law damages for breach of contract under the Tucker Act where the Government has wrongfully terminated the contract. In both situations the contract has been wrongfully terminated so that technically there no longer exists a contract to sue on. In both situations the contractor's cause of action arises out of the same set of facts—the wrongful termination of an express contract. Consequently, in both situations the contractor's claim is "founded" upon an express contract. 28 U.S.C. 1491.

None of the cases cited by the Government to the effect that a suit sounding in quasi-contract or *quantum meruit* is not permissible under the Tucker Act are applicable to the instant case for the simple reason that Acme's cause of action here arose out of and was "founded" upon the breach by the government of an express contract—not upon a contract implied in law. It is true that Acme seeks recovery for the reasonable value of its services; however, its right to claim the reasonable value of its services resulted because the Government improperly terminated plaintiff's express contract. *Cf. Camellia Apartments, Inc.* v. *United States,* 344 F.2d 667 (Ct. Cl., 1964).

Respondent believes that the position of the Government in this case is contrary to the well-established rule in this country that where a plaintiff's failure to complete the contract is due to the defendant's default and the plaintiff elects to forego a suit for damages and sue for restitution, the amount of recovery in such case is not limited to the benefit conferred upon the defendant or to the price set forth in the contract, but the plaintiff may recover the fair and reasonable value

of his part performance. *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co., supra; Southern Painting Co.* v. *United States ex rel. Silver, supra; St. Paul-Mercury Indemnity Co.* v. *United States,* 238 F.2d 918 (C.A. 10, 1956); *Michael Del Balso* v. *Carozza, supra; United States* v. *Brotherton,* 106 F.Supp. 353 (S.D. N.Y., 1952); *Boomer* v. *Muir,* 24 Pac.2d 570 (Cal. App., 1933); *Valente* v. *Weinberg, supra; Heitz* v. *Sayers,* 32 Del. 207, 121 Atl. 225 (1923); *Connolly* v. *Sullivan,* 173 Mass. 1, 53 N.E. 143 (1899); *Hemminger* v. *Western Assurance Co.,* 95 Mich. 355, 54 N.W. 949 (1893); *Johnston* v. *Star Bucket Pump Co.,* 274 Mo. 414, 202 S.W. 1143 (1918); *Matter of Montgomery,* 272 N.Y. 323, 6 N.E.2d 40 (1936); *Philadelphia* v. *Tripple,* 230 Pa. 480, 79 Atl. 703 (1911); *Knapp* v. *Gaston Teyssier,* 96 Pa. Super. 193 (1929); *Pelletier* v. *Masse, supra.* Many other cases to the same effect are cited in Palmer, "The Contract Price as a Limit on Restitution for Defendant's Breach," 20 Ohio St. L. Jour. 264, at 270 (1959). The view expressed in these cases has gained the support of the leading American authorities on the subject. Williston, CONTRACTS, § 1485 (rev. ed. 1937); Corbin, CONTRACTS, §§ 1112 and 1113 (1951); Woodward, QUASI CONTRACTS, § 268 (1913).

2. Though the contract price has been said by some authorities to be evidence of the value of the plaintiff's part performance, it sets no limit upon plaintiff's right of recovery. Williston, CONTRACTS, § 1485 (rev. ed. 1937); Restatement, CONTRACTS, § 347, comment "c"; *United States ex rel. Susi Contracting Co.* v. *Zara Contracting Co., supra.*

It is only where a plaintiff himself is in default that the measure of recovery is limited to the benefit con-

ferred upon the defendant. *Schwasnick* v. *Blandin, supra;* Williston, CONTRACTS, § 1475 (rev. ed. 1937). *Cf. United States* v. *Mississippi Valley Generating Co., supra.*

Since restitutionary relief is not limited to the benefit received by the defendant where the plaintiff is not in default, there is no reason to equate the value of Acme's performance in this case to the value of the benefit received by the Government. Even so, the value of the benefit "received" by the Government in this case is not measured by the contract price but by the value of the "service or forbearance rendered at the defendant's request." Restatement, CONTRACTS, § 348, comment "a".

The cases supporting Acme's position are legion. For example, in *Mooney* v. *York Iron Co.,* 82 Mich. 263, 46 N.W. 376 (1890) the plaintiffs had contracted to sink a mining shaft but their work was stopped by the defendant before completion. Restitution measured by the reasonable value of the plaintiffs' work was granted. The court rejected the defendant's contention that the plaintiffs were entitled to recover only the value of the product of the work; instead, they were entitled to recover "what their work and labor is worth, whether it is of value to the defendant or not." In *Connolly* v. *Sullivan, supra,* the plaintiff was granted recovery of the value of his work in excavating a cellar for a house although the defendant had abandoned his plan to build the house. The court refused to allow deduction of a prospective loss on the contract—in fact, for part performance it allowed a recovery 60% higher than the contract price for full performance. In *Thompson & Son* v. *Brown,* 106 Iowa 367, 76 N.W. 819 (1898), plaintiff contracted to drill a water well but after he had drilled 130 feet the

drill broke in the well, making it necessary to start over again at a new location. The court found that the defendant had breached the contract by refusing to permit plaintiff to do this, and granted restitution measured by the reasonable value of the work. The value to the defendant, (using the test which the Government now urges the Court to adopt) was a useless hole in the ground 130 feet deep. Yet it seemed just to the Iowa Court to compel the breaching defendant to pay the reasonable value of the work he had asked plaintiff to perform.

The position here taken on the scope of restitution for defendant's breach is also fully supported by the writings on the subject. Williston, CONTRACTS, §§ 1459 and 1479 (rev. ed. 1937); Corbin, CONTRACTS, §§ 1107 and 1112 (1951); Dawson, "Restitution or Damages" 20 Ohio St. L. Jour. 175, 190 (1959); Palmer, "The Contract Price as a Limit on Restitution for Defendant's Breach," *supra.*

3. It is erroneous to characterize restitution as "punitive" for this distorts the entire concept of restitution. Restitution is not punitive but, on the contrary, its purpose is to restore the innocent party to as good a position as he would have been in had there been no contract. Under the Court of Claims' decision in the present case recovery is to be measured by actual losses to Acme, except to the extent that such losses are shown to be excessive. Acme in good faith incurred actual costs of over one million dollars in performing the contract [F. 60, R. 231]. It has received payments or other credits equal to approximately only one-half of that sum. Nevertheless, the Government says that even though the Government, not Acme, breached the contract, Acme can-

not recover such unreimbursed costs because this would amount to punishing the Government for its breach. The Government is thereby actually asking that it be allowed the full advantage of a contract which it breached by complete repudiation after part performance. To deny to the Government the advantage of such a contract under the circumstances of this case does not make the measure of recovery adopted by the Court of Claims punitive. The court below simply applied the rule recognized by this Court (*United States* v. *Behan, supra.*) that "it does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend." 110 U.S. at 84.

Respondent believes that the Government's motives in cancelling the contract have no bearing on the issue of the proper measure of recovery. Regardless of what those motives were, the simple fact is that the Government deliverately and consciously put an end to Acme's contract and the Government was fully aware that it was facing the risk of ultimately paying damages for breach of contract in an amount greater than what it would have cost the Government if the contract had been terminated for the convenience of the Government [F. 50(a), R. 204].

Acme's contract was not terminated for the convenience of the Government: the Government repudiated Acme's contract by cancelling it without justification. Thus, the fact that the contract contained a provision authorizing the Government to terminate the contract for the convenience of the Government is

of no importance under the facts of this case. The Government is not entitled to "breach its contract at will, and then escape the penalty for its breach by retroactively invoking a termination for convenience." *Klein* v. *United States,* 285 F.2d 778, 783 (Ct. Cl., 1961). The convenience termination clause should not, consequently, be held to limit the Government's liability to pay damages for breach of contract, where, as in this case, the cancellation is stated to be because of the fault or wrongdoing of the contractor, and it is thereafter determined the contractor was not at fault or engaged in wrongdoing. See *Klein* v. *United States, supra; Goldwasser* v. *United States,* 325 F.2d 722 (Ct. Cl., 1963).

C. The Measure of Recovery Adopted by the Court of Claims Does Not Impair Any Federal Policies.

The Government contends that even if restitution is allowable in a case like this as a matter of sound general contract principles, nevertheless, it should be disallowed on policy grounds.

Respondent is unable to ascertain from the Government's brief just exactly what federal policies it relies upon. There are general references to the Tucker Act, 28 U.S.C. 1491, to the regulations requiring supplies and services to be purchased on a fixed-price basis, to the policy of requiring contracts to be awarded on the basis of competitive bidding, and to the standard default and termination-for-convenience clauses. Respondent believes, however, that the Government has not shown the existence of any recognized and established policy which would limit the Government's liability when it breaches a contract in the manner in which the Government seeks to limit its

liability here. Such a policy, if one exists (and respondent contends it does not), must be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interest." *Muschany* v. *United States,* 324 U.S. at 66.

1. Prior to the enactment of the Tucker Act in 1887, the doctrine of sovereign immunity prevented the Government from being sued for breach of contract without its consent. The Tucker Act gave the Court of Claims power "to render judgment on any claim against the United States founded * * * upon any express or implied contract with the United States * * *." 28 U.S.C. 1491. This Court has said that since the Government has consented to be sued on implied and express contracts, the same remedies are available to the plaintiff suing the Government for breach of contract as would be available were the plaintiff suing another private individual. See, e.g., *Perry* v. *United States*, 294 U.S. 330 (1935).

That restitution is merely an alternative remedy for breach of contract is well-established (see pp. 23-28, *supra*). There is nothing in the Tucker Act which evidences a policy which would prohibit such a remedy under the circumstances of this case.

2. The Tucker Act authorizes suits against the United States "founded" upon express or implied contracts. This action is an action "founded" upon an express contract with the United States. In order for Acme to recover in this action, irrespective of whether it is seeking common law damages or restitutionary relief, it was first necessary for Acme to establish that the Government breached the contract. This was done. Without a breach of this express contract, Acme would

not be able to claim restitution, or, for that matter, damages for a breach. Thus, Acme's claim for restitution arose because of defendant's breach of an express contract. Acme's claim or cause of action is founded upon that contract—restitution is merely one form of relief that the law allows.

The Government's characterization of this action as being "quasi contractual" or "*quantum meruit*" is misleading. This is not a case where no express contract existed [see *Andrews* v. *O'Grady,* 252 N.Y.S.2d 814, 44 Misc.2d 28] or where an express contract had been declared void [See *New York Mail & Newspaper Transp. Co.* v. *United States, supra.*]. This is a case where an express contract was breached by the Government. Because of such breach, which in this case was a complete repudiation of the contract by the Government, Acme is entitled, as an alternative to seeking common law damages, to be placed in as good a position as it would have been had there been no contract. This remedy is not designed to punish the Government. It is designed merely to make Acme whole for the reasonable expenses actually incurred by it in good faith in performing the contract. Surely, the Government should not be allowed to say that it was relieved from complying with the terms of Acme's contract on the one hand and, at the same time, say that Acme was bound by the terms of such contract irrespective of the Government's repudiation of the contract.

3. Respondent submits that the policy of purchasing supplies and services on a fixed-price basis so far as possible does not impose limits on the amount of recovery when the Government breaches a contract. The weight of authority in this country is to the effect

that the contract price is no limitation on the amount recoverable where a plaintiff demands restitution but such contract price is merely evidence of the value of the plaintiff's performance. The Government's fixed-price policy should not be distorted so as to allow the Government to breach a contract and at the same time enforce its provisions against an innocent plaintiff. See *United States* v. *Behan, supra.* Where the Government's termination of a contract does not constitute a breach of contract, then there is, perhaps, some justification for limiting a contractor's recovery. But where the termination is wrongful and constitutes a breach of contract, there is no such justification.

4. Although respondent maintains that the Government has not shown the existence of any recognized policies which would deny restitutional relief in this case and respondent maintains that there are no such policies, respondent believes that the measure of relief adopted by the Court of Claims cannot and does not offend such policies, if there be any. It should be noted that Acme's recovery is limited to the reasonable value of its services [R. 109]. The Government has received a benefit at least to this extent for this was part of that which was bargained for. Acme's costs were incurred in actually performing the contract, not merely in preparation for performance. It cannot be said that punitive damages are being imposed on the Government for the remedy goes no further than repairing the injury suffered by Acme in partially performing a contract which it did not anticipate would be breached before it was completely performed. Acme's costs are merely *prima facie* evidence of the value of its performance. Costs which are shown by the Government as having been incurred, not because of

the Government's cancellation, but because of Acme's inefficiency or extravagance and illegal costs, such as kickback payments latently included in payments to subcontractors, are, according to the Court of Claims, to be deducted from Acme's recovery. Respondent believes that with these guidelines, such a rule is not only consistent with well-established legal precedent but cannot offend any clearly defined federal policy.

CONCLUSION

Respondent respectfully submits that the decision of the court below on the issues before this Court was correct and that such decision should therefore be affirmed.

Respectfully submitted,

JACK REPHAN
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

RAYMOND R. DICKEY
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

BERNARD GORDON
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for Respondent

Office-Supreme Court, U.S.
FILED
DEC 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 86

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY

PETITION FOR REHEARING

JACK REPHAN
RAYMOND R. DICKEY
BERNARD GORDON
1120 Connecticut Avenue, N.W.
Washington, D. C.
Attorneys for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Court's opinion and upon which the decision of this Court rests, are contrary to the Findings of Fact of the Court of Claims.

I.

The Ground on Which the United States Cancelled the Prime Contract With Acme Was Not the Kickback Violations.

The Court of Claims found as a fact that there existed simultaneously two reasons of equal validity in the view of the Army to cancel Acme's contract, namely: (1) the termination of military requirements for the 75-mm rifle and (2) suspicion of Acme's fraud [F. 50, Tr. 204]. Although the alleged kickback violations were considered as a possible justification for the cancellation of Acme's contract by the Army, the Findings of Fact of the Court of Claims relating to post cancellation procedures make it clear that the kickbacks were not relied upon by the Army as a basis for cancellation because of the great doubt which then existed as to whether the Anti-Kickback Act applied to Acme's contract or as to whether there was any right to cancel for the alleged kickback violations [F. 54-55, Tr. 212-223]. It was not until the United States filed its answer in the Court of Claims seven years after it cancelled Acme's contract that violation of the Anti-Kickback Act was specifically advanced as a justification for the United States' cancellation.

II.

It Is Incorrect to Say That the Only Work Not Subcontracted Was the Final Finishing and Assembling of Components.

This Court, on page 3 of its opinion, has overlooked the fact that the most difficult part of the entire contract, that is, the fabrication of the rifle barrels, was performed by Acme in its own plant [Tr. 79, F. 37,

Tr. 158-160]. The extreme difficulties encountered by Acme in fabricating these barrels, which was the most critical part of the 75-mm rifle, are set forth in detail in the Findings of Fact of the Court of Claims [F. 34-44, Tr. 153-194].

III.

Joshua Epstein Was Never Told or Warned That Tucker, Jr. Was Suspected of Having Engaged in Contingent-Fee Arrangements.

The Court has apparently inadvertently confused Harry Tucker, Jr., with his father, Harry Tucker, Sr. It was not Tucker, Jr., who was suspected of having engaged in contingent-fee arrangements with other Government contractors but Tucker's father, who was never connected in any manner whatsoever with Acme. At no time was any official of Acme ever advised or warned that Tucker, Jr. (as opposed to his father, Tucker, Sr.) was suspected of having engaged in any contingent-fee arrangements [F. 8(d), Tr. 128; F. 30, Tr. 149]. There is no Finding of Fact by the Court of Claims that any official of Acme ever received any information to the effect that Tucker, Jr., was suspected of having engaged in any illegal activities.

IV.

There Is No Way in Which Any Kickbacks Could Be Passed on to the Government Under the Facts of This Case.

Acme's bid price of $337 per rifle was so far below the bid of the only established producer of the 75-mm rifle that it cannot be said that this bid price included or could have included any kickback element. At the time Acme submitted its bid, the only other producer of the 75-mm recoilless rifle was the Firestone Tire and Rubber Company which was then producing the recoilless rifle at a price to the Government of $452.60

per rifle. Firestone's bid on this particular contract was $428 per rifle [F. 7, Tr. 126-127]. The Army in fact actually considered Acme's bid price to be too low and offered Acme the opportunity to withdraw its bid [F. 7, 10, 13, Tr. 126, 130, 132]. Under these facts, it cannot be said that Acme's bid was or could have been inflated by any kickbacks.

The total kickbacks allegedly paid in connection with Acme's subcontracts total only approximately $15,000 [F. 54(b), (h), Tr. 213, 218]. The cost data submitted by Acme to be used as a basis for price redetermination reveal a cost of performance of $1,179.29 per rifle through December 31, 1953, and estimated cost to complete of $453.31 per rifle as compared to the contract ceiling price of $362.90 [F. 52, Tr. 206]. The Army would have to disallow approximately $600,000 of Acme's actual costs in order to fall below the ceiling price of $1,191,077 [Tr. 101]. Since Acme's actual costs, exclusive of the alleged kickbacks, overwhelmingly exceed the contract ceiling price, it cannot be said that there was a possibility of the kickbacks being passed on to the Government in the form of a price redetermination upward. Acme's price was not inflated but, on the contrary, the Army was indeed receiving a bargain for it was purchasing for a ceiling price of $362.90 a rifle which actually cost on the average more than $600 to produce.

V.

The Government Is Unjustly Enriched by the Court's Decision.

When the Government cancelled Acme's contract, it withheld from Acme payment for a number of rifles actually delivered to the Government prior to cancellation [F. 54, Tr. 212]. In addition, the Govern-

ment withheld from payments otherwise due to Acme approximately $54,000 as liquidated damages which the Court of Claims held the Government had no right to do [F. 46, Tr. 115-117, 199]. Hence, the Government has received approximately $75,000 to $100,000 worth of recoilless rifles for which it has paid nothing. Under these circumstances, even if the Government had the right to cancel Acme's contract because of the kickbacks, it should still be required to pay Acme the reasonable value of the rifles which were actually delivered to it and which it has not paid for after deducting any sums due the Government on its counterclaim.[1] See *Crocker* v. *United States,* 240 U.S. 74, 81-82 (1916).

CONCLUSION

It is respectfully urged that this Court reconsider its decision of December 5, 1966, in the light of the true facts as were found by the Court of Claims. Respondent submits that this Court has, by its decision, placed an unjust burden upon Government contractors. Even though the individuals involved in this case were convicted of no crime, Acme is being punished by contract cancellation for their acts. But, it is not necessary to punish an innocent party in order to enable the Government to rid itself of a contract of this nature for the Government could have terminated this contract for its own convenience.

Because the decision of this Court is based on facts contrary to those found by the Court of Claims and for the other reasons set forth herein, respondent, Acme Process Equipment Company, respectfully prays

[1] The Court of Claims found the Government was entitled to recover $17,890 on its counterclaim [Tr. 128].

BLANK

PAGE

BLANK

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 86

UNITED STATES OF AMERICA, *Petitioner*

v.

ACME PROCESS EQUIPMENT COMPANY

PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court, respondent, Acme Process Equipment Company, respectfully petitions for a rehearing of the decision of this Court dated December 5, 1966.

GROUND FOR REHEARING

By an opinion delivered by Mr. Justice Black on December 5, 1966, this Court held that the United States had the right to cancel its contract with Acme because three of Acme's employees had accepted compensation for awarding subcontracts in violation of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 704, 41 U.S.C. § 51. Respondent, Acme Process Equipment Company, respectfully urges this Court to grant it a rehearing in this case on the ground that several of the material facts, which are set forth in the

that this Court grant it a rehearing and that it reconsider its decision which holds that the Government's cancellation of the prime contract was proper.

Respectfully submitted,

JACK REPHAN
1120 Connecticut Avenue, N.W.
Washington, D. C.

RAYMOND R. DICKEY
1120 Connecticut Avenue, N.W.
Washington, D. C.

BERNARD GORDON
1120 Connecticut Avenue, N.W.
Washington, D. C.

Attorneys for Respondent

CERTIFICATE PURSUANT TO RULE 58

As provided for in Rule 58 of the Rules of this Court, the undersigned, one of the counsel of record for the respondent, hereby certifies that this petition for rehearing is presented in good faith and not for delay.

BLANK

PAGE

BLANK

PAGE

SUPREME COURT OF THE UNITED STATES

No. 86.—October Term, 1966.

United States, Petitioner, v. Acme Process Equipment Company.	On Writ of Certiorari to the United States Court of Claims.

[December 5, 1966.]

Mr. Justice Black delivered the opinion of the Court.

The respondent Acme Process Equipment Company brought this action against the United States in the Court of Claims to recover damages for breach of a contract under which Acme undertook through itself and subcontractors to manufacture 2,751, 75 mm. recoilless rifles for $337.23 per rifle. Among other defenses, the United States alleged that it had rightfully canceled its contract with Acme because three of Acme's principal employees had accepted compensation for awarding subcontracts in violation of the Anti-Kickback Act set out in part below.[1] The Court of Claims found, as facts,

[1] Section 1 of the Anti-Kickback Act, 60 Stat. 37, as amended, 74 Stat. 740, 41 U. S. C. § 51, provides in pertinent part:

"The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, . . . (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; . . . as an inducement for the award of a subcontract or order from the prime contractor . . . is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor . . . . The amount of any such

that the kickbacks had been paid as alleged and that this was the ground on which the United States had canceled the prime contract with Acme, but construed the Act as not authorizing the cancellation. — Ct. Cl. —, 347 F. 2d 509. We hold that it does.

I.

In October 1952, Acme hired Harry Tucker, Jr., and his associate, James Norris, for the purpose of establishing and managing a new division of the company to handle government contracts. Norris was made general manager of production with authority to submit bids, sign government contracts, and award subcontracts. Tucker was placed in charge of sales, government contracts, and expediting subcontract operations. Prior to this time Tucker had entered into a contract with All Metals Industries, Inc., under which he was to receive a commission for all sales to customers, including Acme, procured by him. Tucker's employment contract with Acme specifically stated that he represented and would continue to represent firms in other lines of business, but Acme did not consult with any of his other clients at the time Tucker was hired.

Late in October, Tucker advised his superiors at Acme of the proposed Army contract for rifles, and at Tucker's suggestion, Acme submitted a bid of $337 per rifle. Since Acme's bid was the lowest, the Army began negotiations with Acme culminating in the award of the contract in January 1953. The negotiations were handled by Tucker and Norris for Acme. Since it was contemplated that

---

fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff . . . or by an action in an appropriate court of the United States. . . ."

Section 4 of the Act, 41 U. S. C. § 54, provides:

"Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both."

the project would be largely subcontracted, leaving to Acme only the final finishing and assembly of components, the Army expressed a keen interest in Acme's proposed subcontractors. Not only did it review Acme's subcontracting plans and require Acme to notify it of changes in those plans during the final stages of negotiation, but the contract eventually awarded required government approval of all subcontracts in excess of $25,000. All Metals, because its proposed subcontract amounted to one-third of the amount of the prime contract, actually participated in the negotiations between Acme and the Army.

During this period of negotiation two other developments took place. Tucker obtained agreements from two other potential subcontractors to pay him commissions on any orders he could procure from Acme. Army contracting officers warned Acme's president, Joshua Epstein, that Tucker was suspected of having engaged in contingent-fee arrangements with other government contractors.

Finally Acme was awarded the prime contract. Although the price was fixed at $337 per rifle, the contract contained a price redetermination clause under which, after 30% of the rifles were delivered, the parties could negotiate the price on past and future shipments upward or downward, with an upper limit of $385 per rifle. Within a few weeks after the prime contract was awarded, All Metals and the other two companies with which Tucker had prior kickback arrangements obtained subcontracts from Acme.[2] Tucker was paid his kickbacks, but apparently unsatisfied with the amount of his payoff, he got Jack Epstein, the superintendent of

---

[2] Shortly after the prime contract was awarded, two other companies paid Tucker and Norris' assistant kickbacks for obtaining subcontracts from Acme. This made a total of five subcontracts obtained through kickbacks.

the chief Acme plant and the son of Acme's president and principal stockholder, to join the kickback conspiracy. Together Epstein and Tucker threatened to cancel All Metals' subcontract unless it paid $25,000 to a dummy corporation owned by Tucker, Norris, and Epstein for fictitious consulting services. All Metals reluctantly acceded to the shakedown. The amount paid to Tucker, Norris, and Epstein was charged to Acme through an increase in the subcontract price.

Although they knew that Tucker was representing other companies and had been notified of the Army's suspicions of Tucker's involvement in contingent-free arrangements, other officials of Acme were not aware of the kickback activities of Tucker, Norris, and Epstein until late in 1953. At that time, Acme's president caused the resignation of the three suspected officials.

In 1956 Tucker, Norris, and Epstein were indicted for violation of the then Anti-Kickback Act, 60 Stat. 37.[3] After presentation of the Government's case, the District Court granted the defendants' motion for acquittal on the ground that the Act—which at that time embraced only "cost-plus-a-fixed-fee or other cost reimbursable" government contracts—did not apply to Acme's contract, a fixed-price contract with a provision for limited price redetermination. The court found the defendants' actions "despicable and morally reprehensible, but unfortunately within the narrow letter of the law." The court recommended that Congress amend the Anti-Kickback Act "to include as a crime the vicious and immoral type of conduct that has been exhibited in this case." *United States* v. *Norris*, Crim. No. 18535 (D. C. E. D. Pa.), April 14, 1956.

---

[3] This was the original Anti-Kickback Act passed by Congress in 1946. It expressly prohibited kickbacks only to employees of "a prime contractor holding a contract . . . on a cost-plus-a-fixed-fee or other cost reimbursable basis . . ."

The District Court's opinion did indeed spur the Comptroller General to recommend amendatory legislation and in 1960 the Anti-Kickback Act was amended to apply to all "negotiated contracts."[4] The civil provision of the amended Act was made retroactive to allow government recovery of kickbacks "whether heretofore or hereafter paid or incurred by the subcontractor."

II.

The Anti-Kickback Act, as originally passed in 1946 and as amended in 1960, provides two express sanctions for its violation: (1) fine or imprisonment for one who makes or receives a kickback, and (2) recovery of the kickback by the United States. The Court of Claims held, and it is argued here, that had Congress wanted "to provide the additional remedy of contract annulment, it could have done so" by express language, — Ct. Cl., at —, 347 F. 2d, at 521, and of course it could have. But the fact that it did not see fit to provide for such a remedy by express language does not end the matter. The Anti-Kickback Act not only "prohibited" such payments, but clearly expressed a policy decidedly hostile to them. They were recognized as devices hurtful to the Government's procurement practices. Extra expenditures to get subcontracts necessarily add to government costs in cost-plus-a-fixed-fee and other cost reimbursable contracts. And this is also true where the prime contract is a negotiated fixed-price contract with a price redetermination clause, such as this prime contract is here. The kickbacks here are passed on to the Government in two stages. The prime contractor rarely submits his bid until after he has tentatively lined up his subcontractors. Indeed, as here, the subcontrac-

[4] See generally H. R. Rep. No. 1880, S. Rep. No. 1585, 86th Cong., 2d Sess. The Act, as amended, is set out in note 1, *supra*.

tors frequently participate in negotiation of the prime contract. The subcontractor's tentative bid will, of course, reflect the amount he contemplates paying as a kickback, and then his inflated bid will be reflected in the prime contractor's bid to the Government. At the renegotiation stage, where the prime contractor's actual cost experience is the basis for price redetermination, any kickbacks, paid by subcontractors and passed on to the prime contractor after the prime contract is awarded, will be passed on to the Government in the form of price redetermination upward.[5]

Acme argues, however, that the express provision for recovery of kickbacks is enough to protect the Government from increased costs attributable to them. But this argument rests on two false assumptions. The first is that kickbacks can easily be detected and recovered. This is hardly the case. Kickbacks being made criminal means that they must be made—if at all—in secrecy. Though they necessarily inflate the price to the Government, this inflation is rarely detectable. This is particularly true as regards defense contracts where the products involved are not usually found on the commercial market and where there may not be effective competition. Such contracts are generally negotiated and awarded without formal advertising and competitive bidding, and there is often no opportunity to compare going prices with the price negotiated by the Govern-

[5] This is precisely what happened here before the Government canceled Acme's contract. Acme in 1953 submitted cost data for price redetermination purposes that included the charges of the five subcontractors which had paid kickbacks to Acme's employees. These subcontracting charges in turn included the amounts paid as kickbacks. Had the kickbacks not been discovered and the contract not been canceled, Acme would have been able to use these costs to renegotiate the price per rifle from $337 to $385. Such price redetermination could have cost the Government about $200,000 more on the entire contract.

ment.[6] Kickbacks will usually not be discovered, if at all, until after the prime contract is let. The second false assumption underlying Acme's argument is that the increased cost to the Government is necessarily equal to the amount of the kickback which is recoverable. Of course, a subcontractor who must pay a kickback is likely to include the amount of the kickback in his contract price. But this is not all. A subcontractor who anticipates obtaining a subcontract by virtue of a kickback has little incentive to stint on his cost estimates. Since he plans to obtain the subcontract without regard to the economic merits of his proposal, he will be tempted to inflate that proposal more than the amount of the kickback. And even if the Government could isolate and recover the inflation attributable to the kickback, it would still be saddled with a subcontractor who, having obtained the job other than on merit, is perhaps entirely unreliable in other ways. This unreliability in turn undermines the security of the prime contractor's performance—a result which the public cannot tolerate, especially where, as here, important defense contracts are involved.

III.

In *United States* v. *Mississippi Valley Co.*, 364 U. S. 520, 563, the Court recognized that "a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment." The Court there approved the cancellation of a government contract for violation of the conflict-of-interest statute on the ground that "the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in" the statute. *Ibid.* We think the same thing can be said about cancellation here.

[6] See S. Rep. No. 1585, *supra*, note 4, at 3.

The Court of Claims, in holding that the Anti-Kickback Act does not authorize government cancellation because of its violation, distinguished *Mississippi Valley Co.* on the ground that the Anti-Kickback Act, unlike the conflict-of-interest statute, provides a civil as well as a criminal remedy. But we do not deem the provision of a civil remedy in the Anti-Kickback Act decisive. Where there is a mere conflict of interest, no concrete monetary rewards may have been received or paid which the Government can recover in a civil action. But where there is commercial bribery in the form of a kickback, there is something specific which the Government can recover, and hence it was quite natural for Congress to provide this express remedy. There is absolutely no indication in the legislative history of the Anti-Kickback Act that Congress, in providing a civil remedy for a more tangible evil, intended to preclude other civil sanctions necessary to effectuate the purpose of the Act.

There is likewise no merit to the Court of Claims' distinction of the *Mississippi Valley Co.* case on the ground that there the criminal provision of the conflict-of-interest statute was violated whereas here the kickback conspirators were acquitted of violating the Anti-Kickback Act as it existed when the kickbacks occurred, prior to 1960. As we have seen, Acme's employees were acquitted on the technical ground that Acme's prime contract was not a "cost reimbursable" contract to which the Act then expressly applied. It is unnecessary for us to decide whether this holding was correct.[7] For whether the kickbacks here contravened the narrow letter of the criminal law, strictly construed, they clearly

---

[7] See *United States* v. *Barnard*, 255 F. 2d 583, cert. denied, 358 U. S. 919, holding that a fixed-price contract with provision for unlimited price redetermination is a "cost reimbursable" contract.

were violative of the public policy against kickbacks first expressed by Congress in 1946. If Congress then limited the reach of the Act to cost reimbursable contracts, it was only because other types of negotiated contracts were rarely in use then. Though the recent extensive use of other forms of negotiated contracts lead Congress in 1960 to amend the Act to cover clearly these types of contracts and to close the technical loophole opened by the acquittal of Acme's employees, the congressional policy against *all* kickbacks was not changed. Congress merely reiterated its recognition of the evil and sought to correct the letter of the law to effectuate its long-standing policy. In making the civil remedy of the 1960 Act retroactive, Congress clearly indicated that there had been no basic change in the public policy against kickbacks.

This public policy requires that the United States be able to rid itself of a prime contract tainted by kickbacks. Though the kickbacks did not take place until after the prime contract was awarded to Acme, the kickback arrangements existed either at the time the prime contract was awarded or shortly thereafter, and at least one of the kickbacking contractors actually participated in the negotiation of the prime contract. These circumstances, as well as the price redetermination feature of the prime contract, produced a great likelihood that the cost of the prime contract to the Government and the reliability of Acme's performance under it would be directly affected by the fact that the prime contract was to be performed largely through subcontracts obtained by kickbacks.

The Court of Claims, in holding that the Act does not authorize government cancellation because of kickbacks, relied heavily on its finding that none of the officers of Acme were aware of the kickbacks. But as previously stated those of Acme's employees and agents who did

know were in the upper echelon of its managers. One of the guilty employees was the general manager of one of the company's chief plants and the son of Acme's president, and the two other kickback receivers were in charge of operations, sales, and government contracts. They were the kind of company officers for whose conduct a corporation is generally held responsible. Cf. *Gleason* v. *Seabord Air Line R. Co.*, 278 U. S. 349. Since Acme selected those agents to carry on its business in obtaining and performing government contracts, there is no obvious reason why their conduct in that field should not be considered as Acme's conduct, particularly where it touches the all-important subject of kickbacks. And here, as this Court said about the conflict-of-interest statute in *United States* v. *Mississippi Valley Co., supra*, at 565, it is appropriate to say that it is the "inherent difficulty in detecting corruption which requires that contracts made in violation of . . . [the Anti-Kickback Act] be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent."

The judgment of the Court of Claims is reversed with directions to sustain the United States' right to cancel the prime contract.

It is so ordered.